90-1864

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES B. RUTLAND,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the due process clause of the Constitution prohibits a court from placing upon a defendant the burden of disproving an essential element of the offense of conspiracy—membership; a decision on this issue is necessary to resolve the conflict between the circuit courts of appeals as well as the inconsistency of those opinions with this Court's opinion in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977).

(2) Whether the rule of *per se* liability under the Sherman Act, 15 U.S.C. § 1, should be applied to a noncompetitor when such an application actually reduces competition and efficiency and expands the harsh *per se* rule, contrary to this Court's recent jurisprudence.

II. LIST OF PARTIES

The parties to the proceedings below were the petitioner, James B. Rutland, Robert P. McCracken, MMR Corp. (LA), a wholly owned subsidiary of MMR Holding Corporation, and the respondent, the United States of America.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, James B. Rutland, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on July 23, 1990 and for which a Petition for Panel Rehearing was denied on October 9, 1990.

V. OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported as *United States v. MMR Corp. (LA)*, 907 F.2d 489 (5th Cir. 1990) and is reprinted in the Appendix hereto, p. 16a, *infra*.

No written opinion was issued by the trial court, the United States District Court for the Eastern District of Louisiana, Henry A. Mentz, District Judge.

VI. JURISDICTION

The Judgment of the Court of Appeals was entered on July 23, 1990, and a Petition for Rehearing was denied on October 9, 1990. (Appendix, p. 38a, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

15 U.S.C. § 1. *Trust, etc., in Restraint of Trade Illegal; Penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $1 million if a corporation, or, if any other person, $100,000.00, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

VIII. STATEMENT OF THE CASE

A. Proceedings Below

The indictment in this case was returned on November 3, 1988. Verdicts were rendered on May 11, 1989, after a six-week trial that included four days of jury deliberations and a deadlock note from the jury. Robert P. McCracken, chairman of MMR Corp. (LA), was acquitted on all counts of the indictment. MMR Corp. (LA) and its President, James B. Rutland ("Mr. Rutland"), each were convicted on all counts, to wit: one count of violating § 1 of the Sherman Act, 15 U.S.C. § 1, and three counts of mail fraud, 18 U.S.C. § 1341. As to MMR, the district court imposed a fine of $1,000,000 on the antitrust count and $1,000 on each of the mail fraud counts. As to Mr. Rutland, the court imposed a sentence of six months imprisonment, fines totalling $103,000 and five years probation. The United States Court of Appeals for the Fifth Circuit affirmed these convictions on July 23, 1990. A petition for panel rehearing was denied on October 9, 1990.

B. Facts: The Antitrust Issue

Both the Sherman Act count and the three mail fraud counts were based on the allegation that Mr. Rutland and MMR participated in a conspiracy to rig bids for the prime electrical contract known as Big Cajun No. 2, Unit 3 ("Big Cajun"), a power plant in New Roads, Louisiana built and operated by Cajun Electric Power Cooperative, Inc. ("Cajun Electric"). MMR did not and *could not* submit a bid for the prime electrical contract. Prior to the bid date, Mr. Rutland notified Cajun Electric, verbally and in writing, that MMR would not submit a bid. Fischbach & Moore ("Fischbach"), the ultimate low bidder and MMR's alleged co-conspirator, received a copy of this notification.

During late 1980 and early 1981, the electrical contracting industry was dominated by a small number of large national firms that had the financial resources, bonding capacity and

experience to perform enormous contracting jobs like the $21 million Big Cajun project. By far, Fischbach was the largest electrical contractor, with 1980 fiscal year revenues of more than $800 million. (R. Vol. 25, p. 37; Vol. 39, pp. 33-34.) Other large national contractors included Lord Electric Company ("Lord"), The Howard P. Foley Company ("Foley"), L.K. Comstock & Company ("Comstock"), and Hatzel & Buehler, Inc. ("Hatzel & Buehler"). All were alleged co-conspirators in this case.

These large national contractors had for some years been cooperating with each other in allocating large construction projects throughout the United States. The indictment alleged, (R. Vol. 1, pp. 00273-274), and it was undisputed at trial, that representatives of these large national contractors discussed the allocation of upcoming power plant projects, including the Big Cajun project, in a New York City hotel room in March 1980 and at a New Jersey country club in April 1980. (R. Vol. 24, pp. 35-37; Vol. 49, pp. 69-70.)

At all material times, MMR, a much smaller company, was based in Baton Rouge, Louisiana. MMR was not present at, was not invited to, and apparently was not even mentioned during the meetings of the large national contractors. (R. Vol. 25, pp. 29-31; Vol. 51, pp. 79-80.)

Unlike these large national contractors, MMR was primarily a specialty contractor—its principal experience and expertise was in instrumentation work, which involves installing and testing instruments which measure temperature, pressure, flow, and various processes in power plants and other commercial and industrial facilities. MMR's status as an instrumentation contractor, as opposed to an electrical contractor, was consistently acknowledged by Government witnesses. It was also recognized by the Fifth Circuit Court of Appeals. *See, United States v. MMR Corp. (LA)*, 907 F.2d 489, 492 (5th Cir. 1990) (Appendix p. 17a).

Beginning in the late 1970's, Cajun Electric undertook the construction of three units at the New Roads site. MMR participated in the construction of Units 1 and 2 in a joint

venture with Lord Electric ("Lord"). Lord's huge financial resources satisfied the bonding and financial requirements of the project. Because it was a local contractor, MMR's participation consisted primarily of supervising the local labor. (R. Vol. 25, p. 27; Vol. 55, pp. 45-46.) The contract for Units 1 and 2 together amounted to approximately $10 million. (R. Vol. 24, p. 41.)

Because MMR had established a relationship with Cajun Electric through this joint venture with Lord on Units 1 and 2, MMR made an effort to be placed on the list of prospective bidders for Unit 3. MMR, Burns & Roe, the project engineers, and Cajun Electric all initially believed that Unit 3 could be built for approximately $11 million, (R. Vol. 40, p. 59), roughly the same price as Units 1 and 2. (R. Vol. 21, p. 53; Vol. 55, pp. 55-56; R. Vol. 40, p. 59.) However, it was soon discovered that the cost to build Unit 3 would be double this original estimate.

A crucial requirement of the Big Cajun Unit 3 project, which was spelled out in the bidding documents and was known by all participants, was that the successful bidder would have to obtain a performance bond. (R. Vol. 35, p. 80; Vol. 55, p. 46; Vol. 40, p. 149; Vol. 57, p. 7.) In addition, before a contractor could even submit a bid, it had to submit a bid bond or a certified check for 10% of its bid. If a bidder was selected by Cajun Electric to do the work and for any reason was unable to obtain a performance bond, its bid bond or check would be forfeited. (R. Vol. 40, p. 151; Vol. 57, pp. 83, 209.)

Once it became known that the cost to build Unit 3 would be more than double the initial $11 million estimate, MMR learned that it could not obtain bonding. MMR, therefore, was precluded from competing for the prime electrical contract. This fact was proven through contemporaneous documents, (R. Vol. 57, pp. 113-118, 122-126), through the testimony of witnesses called by both the Government, (R. Vol. 40, p. 149; Vol. 56, pp. 13-14), and the defense, (R. Vol. 57, pp. 131-34), and was finally conceded by the Gov-

ernment, (R. Vol. 58, p. 14). This fact was also recognized by the Court of Appeals. *See*, *MMR*, 907 F.2d at 494, n. 1 (Appendix, p. 21a, n. 1).

It was undisputed that Mr. Rutland and MMR had no contact with Lord, Foley, Comstock and Hatzel & Buehler, Fischbach's co-conspirators. Only Fischbach officials had any contact with MMR prior to the bid date. Moreover, the Fischbach officials acknowledged that they had only two meetings with MMR prior to the bid—one at the City Club in Baton Rouge on December 19, 1980 and a second at Fischbach's office in New Orleans on January 14, 1981.

The indictment is very specific about what allegedly occurred at each meeting. It charged that Mr. Rutland and MMR joined the conspiracy at a meeting at the City Club in Baton Rouge on December 19, 1980 when they "reached the following understanding and agreement . . ." to "submit a high, complementary bid to support Fischbach's bid" and "that in consideration for . . . MMR's agreement . . . Fischbach would award MMR a lucrative subcontract . . . the precise terms of which would be negotiated later." (Emphasis added.) (R. Vol. 1, pp. 00275-00276, par. 20(b); Appendix, p. 7a.)

The indictment *also* charged that Mr. Rutland and MMR agreed not to submit a bid: in January, 1981, (a Fischbach official) told ". . . James B. Rutland that MMR could fulfill its agreement not to compete . . . by not submitting a bid. . . ." (*Id.*, p. 00278, par. 20(f); Appendix, p. 8a.)

Despite the undisputed fact that MMR was not a competitor for the prime electrical contract, the case proceeded to trial on the Government's theory that MMR was subject to *per se* criminal liability under Section 1 of the Sherman Act for restraining competition in connection with the bidding on that contract.

C. Facts: The Withdrawal Issue

During the trial, the Government repeatedly argued that defendants **"joined the conspiracy during a meeting at the City Club . . . on December 19, 1980."** The indictment alleged that **"at the City Club meeting, MMR agreed to submit a high, complementary bid to support Fischbach's bid."** However, despite this alleged agreement to submit a high, complementary bid, approximately one month after the City Club meeting and the day before the bids were due, Mr. Rutland orally and by letter informed Cajun Electric that MMR **would not submit a bid**. (R. Vol. 55, p. 20; Vol. 21, pp. 20-21; Vol. 57, p. 5.) It was undisputed at trial that Fischbach received a copy of this letter. (R. Vol. 49, p. 90.)

During deliberations, the jury expressed an interest in the issue of withdrawal from the conspiracy raised by Mr. Rutland's verbal and written notice to Cajun Electric that MMR would not bid the prime electrical contract. The jury sent a note requesting an explanation of the court's previously given instructions on the withdrawal defense: "May we please have the explanation of positive action and withdrawal from a conspiracy." (R. Vol. 8, p. 0038, Vol. 65, p. 28.) However, no explanation was given by the trial court. Instead, it simply provided the jury with a copy of the erroneous withdrawal instruction which it previously had read to the jury.

The district court also refused to give the jury instruction requested by the defendants on the issue of withdrawal which properly allocated the burden of proof to the Government. The court, instead, gave the Fifth Circuit pattern instruction which did not properly allocate the burden of proof. The Fifth Circuit, while acknowledging a split in the circuit courts of appeal on this issue, *MMR*, 907 F.2d at 499-500 (Appendix, p. 31a), circumvented the issue. *Sua sponte* it found that the defendants were not even entitled to a withdrawal instruction. It ignored the fact that the district court found sufficient evidence to warrant a withdrawal instruction and submitted the withdrawal issue to the jury.

IX. REASONS FOR GRANTING THE WRIT

A. The Due Process Clause of the Constitution Prohibits a Court from Placing Upon a Defendant the Burden of Disproving an Essential Element of the Offense of Conspiracy—Membership; a Decision of this Issue is Necessary to Resolve the Conflict between the Circuit Courts of Appeals as Well as the Inconsistency of Those Opinions with This Court's Opinion in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)

In its opinion, the Fifth Circuit Court of Appeals stated that **"The law in this circuit is that the burden of proving withdrawal, an affirmative defense, is on the defendant."** *United States v. MMR Corp. (LA)*, 907 F.2d 489, 499 (Appendix, p. 31a). This holding directly conflicts with the holding of the Seventh Circuit Court of Appeals in *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981) which has been adopted by the Ninth Circuit Court of Appeals. *See*, *Manual of Model Criminal Jury Instructions for the Ninth Circuit* (West 1989). It is also contrary to the law of affirmative defenses set forth by this Court in *Patterson v. N.Y.*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

The remaining Circuit Courts of Appeal are aligned with the Fifth Circuit on this issue, creating a split in the circuits. *See*, *United States v. James*, 609 F.2d 36, 41 (2nd Cir. 1979), *cert. denied*, *James v. U.S.*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); *United States v. Gillen*, 599 F.2d 541, 548 (3rd Cir. 1979), *cert. denied*, *Gillen v. U.S.*, 444 U.S. 866, 100 S.Ct. 137, 62 L.Ed.2d 89 (1979); *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986); *Chiropractic Cooperative Ass'n. v. American Medical Ass'n.*, 867 F.2d 270, 274 (6th Cir. 1989); *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, *Artez v. U.S.*, 444 U.S. 1089, 100 S.Ct. 1052, 62 L.Ed.2d 777 (1980); *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, *Cox v. U.S.*, 439 U.S. 1076, 99 S.Ct. 852, 59 L.Ed.2d 44 (1979); *United States v. Finestone*, 816 F.2d 583, 589 (11th

Cir. 1987), *cert. denied*, *Finestone v. U.S.*, 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987).

The position taken by the Fifth Circuit and the other Circuit Courts of Appeal, except the Seventh and the Ninth, impermissibly places the burden of proof of withdrawal from a conspiracy on the defendant. This shifting of the burden of proof to the defendant relieves the Government of the constitutional requirement of proving each element of the charged offense beyond a reasonable doubt, in this case, the element of membership in a conspiracy. *See*, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

This Court has previously expressed interest in the affirmative defense of withdrawal from an antitrust conspiracy. *See*, *United States v. U.S. Gypsum Company*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). In *Gypsum*, this Court held that giving an unnecessarily confining withdrawal instruction was reversible error.

In *Patterson v. New York*, 432 U.S. 211, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), this Court held that due process requires an inquiry as to whether the particular affirmative defense *negates* an essential element of the offense required to be proved for conviction. 432 U.S. at 210, 97 S.Ct. at 2327. If the affirmative defense negates an essential element of the offense charged, then the Due Process Clause of the Constitution prohibits the court from placing the burden of proof of that defense on a defendant. Since the defense of withdrawal from a conspiracy brings into question an element necessary for conviction—membership, the burden of proof cannot constitutionally be placed on a defendant.

In a prosecution for conspiracy, the Government must prove that each defendant was a member of the conspiracy. As recognized by the court in *Read*, 658 F.2d at 1232-33: **"By definition, after a defendant withdraws, he is no longer a member of the conspiracy and later acts of the conspirators do not bind him. . . . Withdrawal becomes a complete defense only when coupled with the statute of limitations. A**

defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him."

After an exhaustive analysis of the decisions of this Court in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), the Seventh Circuit concluded that placing the burden of proving withdrawal on the defendant arose from a misinterpretation of *Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912). The Seventh Circuit held that, properly read, *Hyde* requires that only the *initial* burden of going forward with some evidence of withdrawal should be on the defendant. However, once the defendant advances some evidence, the burden of persuasion shifts to the prosecution to disprove the defense of withdrawal beyond a reasonable doubt. **"As in the cases of other defenses, once the jury has been instructed on the withdrawal defense, the jury should be instructed that the Government bears the burden of disproving withdrawal beyond a reasonable doubt."** 658 F.2d at 1236. *E.g. United States v. Landry*, 257 F.2d 425, 429-30 (7th Cir. 1958) (entrapment); *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979) (entrapment); *United States v. Booz*, 451 F.2d 719, 723 (3rd Cir. 1971), *cert. denied*, *Booz v. U.S.*, 414 U.S. 820, 94 S.Ct. 45, 38 L.Ed.2d 52 (1973) (alibi); *United States v. Corrigan*, 548 F.2d 879, 882 (10th Cir. 1977) (self-defense); *United States v. Sennett*, 505 F.2d 774, 778 (7th Cir. 1974) (insanity).

These decisions, when applied by analogy to the affirmative defense of withdrawal and the Seventh Circuit's analysis in *Read*, have left an integral component of conspiracy law—membership—unsettled. Which party has the burden of proof as to withdrawal from a conspiracy depends solely upon where he or she is being prosecuted. The presumption of innocence inherent in due process requires that the government, not the defendant, persuade the jury that the accused was a member of an illegal conspiracy. The *Read* analysis is correct: **All that is required to successfully establish with-**

drawal is that a reasonable doubt be created as to the defendant's membership in the conspiracy. *Read*, 658 F.2d 1225 at 1239.

This case squarely presents the ultimate burden of persuasion issue for this Court's resolution. MMR and Mr. Rutland submitted a proposed jury instruction on withdrawal, citing *U.S. v. Read, supra*, which placed the ultimate burden on the government of disproving the affirmative defense beyond a reasonable doubt. (Appendix, p. 13a.) Over defendants' objections, the district court refused to give this instruction. (R. Vol. 62, p. 119.) Instead, as the Fifth Circuit even recognized, the trial court gave an instruction which placed the burden of proving withdrawal on the defendants. 907 F.2d 489, 499 n.3. (Appendix, p. 31a, n.3).

During the trial, the Government repeatedly argued that defendants **"joined the conspiracy during a meeting at the City Club . . . on December 19, 1980."** The indictment alleged that **"at the City Club meeting, MMR agreed to submit a high, complementary bid to support Fischbach's bid."** However, despite this alleged agreement to submit a high, complementary bid, approximately one month after the City Club meeting and the day before the bids were due, Mr. Rutland orally and by letter informed Cajun Electric that MMR *would not submit a bid.* (R. Vol. 55, p. 20; Vol. 21, pp. 20-21.) It was undisputed at trial that Fischbach received a copy of this letter. (R. Vol. 49, p. 90.)

This failure by MMR to submit a bid was absolutely antithetical to the indictment's charge and the Government's repeated assertions that MMR had joined the conspiracy at the City Club by agreeing with Fischbach to submit a high, complementary bid. MMR's subsequent notification to Cajun Electric and Fischbach that it would not submit a bid and its failure to bid clearly raised the issue of a withdrawal from the conspiracy. (Since the indictment was not returned until November 3, 1988, a withdrawal prior to November 3, 1983 would have required an acquittal because of the five (5) year statute of limitations.) 18 U.S.C. § 3282. The evidence was

undisputed that Mr. Rutland's notification to Cajun Electric and Fischbach that MMR would not bid was given January 15, 1981, *supra*.) This Court has held, "**(A)ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.**" *United States v. United States Gypsum Co.*, 438 U.S. 422, 464, 98 S.Ct. 2864, 2887, 57 L.Ed.2d 854 (1978). In *Gypsum*, this Court also established a liberal policy in favor of a jury's freedom to consider evidence regarding a defendant's continued participation in a conspiracy. *Id.* at 2887.

The trial court found that Mr. Rutland's oral and written communications to Cajun Electric stating that MMR would not bid met the defendants' initial burden of producing some evidence of withdrawal. The defendants were, thus, entitled to a withdrawal instruction which, although erroneous, was given by the trial court. Further, the jury evidenced its concern as to the possibility of withdrawal. After two days of deliberations, it sent a note to the trial court stating: "**May we please have the explanation of positive action and withdrawal from a conspiracy?**" A copy of the court's previous and erroneous instruction was then sent to the jury without the requested explanation. Even during closing argument, the Government addressed the withdrawal issue. (R. Vol. 61, p. 90.) And on appeal, the Government conceded that the trial court ". . . permitted the jury to consider the defense of withdrawal." Despite these events and despite this Court's liberal policy favoring a jury's freedom to consider evidence regarding a defendant's continued participation in a conspiracy, *Gypsum*, 98 S.Ct. at 2887, the Court of Appeals, *sua sponte*, held that the defendants were not even entitled to a withdrawal instruction because the issue was not sufficiently raised. The Court of Appeals had no basis for upsetting the trial court's finding that the defendants had met their initial burden of producing some evidence of withdrawal sufficient to submit the factual issue to the jury.

The holding of the Fifth Circuit Court of Appeals relieves the Government of its constitutional burden of proving beyond a reasonable doubt every element necessary for conviction in a conspiracy prosecution. Likewise, decisions of the other circuit courts of appeals, except the Seventh and the Ninth, have violated constitutional due process by impermissibly placing upon a defendant the burden of proving non-membership in a conspiracy as a result of withdrawal.

Since conspiracy doctrines, including withdrawal, apply in a multi-party mail fraud scheme as charged in this case, this refusal to correctly instruct the jury also constituted reversible error as to Counts II, III, and IV. *United States v. Cohen*, 516 F.2d 1358, 1364 (8th Cir. 1975); *United States v. Dick*, 744 F.2d 546, 552 (7th Cir. 1984); *United States v. Toney*, 605 F.2d 200, 207 (5th Cir. 1979), *cert. denied*, 444 U.S. 1090 (1980).

B. The Rule of *Per Se* Liability under the Sherman Act, 15 U.S.C. § 1, Should Not Be Applied to a Noncompetitor When Such an Application Actually Reduces Competition and Efficiency and Expands the Harsh *Per Se* Rule, Contrary to This Court's Recent Jurisprudence.

The Sherman Act, 15 U.S.C. § 1, provides, in relevant part: "**Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal.**" Since its earliest decisions, this Court has recognized that § 1 "**was only intended to prohibit unreasonable restraints of trade.**" *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988), *cert. denied*, 486 U.S. 1005, 108 S.Ct 1727, 100 L.Ed.2d 192 (1988).

"**Ordinarily, whether particular conduct violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an**

unreasonable restraint on competition.' " *Id.* (Citation omitted.) The application of the rule of reason can generally be described as a three-step process: **"First, the court must determine the restraint's purpose. Second, the court must identify the likely effects of the restraint. Last, the court must balance the anticompetitive and procompetitive purposes and effects in an effort to ascertain if the restraint would substantially impede competition."** *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir. 1986) (citing, L. Sullivan, *Antitrust Law* § 68 at 187-188 (1977)), *cert. denied*, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

Despite the ordinary application of the rule of reason, certain categories of restraints have been held to be illegal *per se* **"dispensing with the need for case-by-case evaluation."** *Business Electronics*, 485 U.S. at 723, 108 S.Ct. at 1519, 99 L.Ed.2d 808. This rule of *per se* liability applies to restraints **"which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without an elaborate inquiry as to the precise harm they have caused or the business excuse for their use."** *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

In this case the decision to apply the *per se* rule will have a radical impact on the competitive structure of the construction industry; **it will stand that industry on its head by dismantling its competitive structure.** Further, the courts below erred when they indiscriminately applied the harsh rule of *per se* liability to Mr. Rutland and MMR, who were not competitors. This holding created the following absurd result: MMR and Mr. Rutland were convicted of the crime of agreeing not to compete, even though they were incapable of competing in the first place.

For reasons discussed below, the conduct of Mr. Rutland and MMR promoted competition, had redeeming virtue, was

not pernicious and should not have been scrutinized under the *per se* rule.

1. The Application of the *Per Se* Rule in This Case Directly Conflicts with the Aims of the Sherman Act.

The Application of the *per se* rule to Mr. Rutland and MMR restricts, instead of protects, competition. It also reduces the efficiency of the uniquely structured construction industry.

a. Contrary to Protecting and Promoting Competition, the Application of the *Per Se* Rule Restricts Competition in This Case.

One of the the primary aims of the Sherman Act and other antitrust legislation is to protect and foster competition. *See, Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689, 95 S. Ct 2598, 2615, 45 L.Ed.2d 463 (1975) ("[T]he sole aim of antitrust legislation is to protect competition. . . ."). The Sherman Act must be construed in accordance with its aims; courts cannot derogate from those aims when interpreting it. *See, U.S. v. Cooper Corporation*, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941). The courts below applied the *per se* rule in a manner that restricts competition in the construction industry and, therefore, conflicts with the aims of the Sherman Act. A brief description of the construction industry will help elucidate this conflict.

The construction industry is multi-tiered. *See*, J. Lambert & L. White, *Handbook of Modern Construction Law*, § 3.1 at 47 (1982) ("Lambert & White"). Typically, a construction company that desires to act as a prime contractor submits its bid on a construction project to the project owner ("owner"). (In this case, Cajun Electric was the project owner.) Often, owners seeking to initiate private construction projects compile a list of companies ("bid list") that they believe possess the qualifications and capabilities of potential prime contractors and invite bids from those companies. *See*, Lambert & White, § 2.5 at 33; *see also*, S.P. Oppenheimer,

Directing Construction for a Profit: Business Aspects of Contracting, § 9-2 at 122-124 (1971). Prime contract bids are normally based on prices that the potential prime contractors have received from other contractors that desire to perform various specialized portions of the prime contract. These subcontractors may, in turn, have received prices from their own subcontractors. Another layer is added by the fact that the prime contractor and the various subcontractors have numerous suppliers of materials.

In order to bid as a prime contractor, a company must have financial resources that can adequately meet several requirements. First, often (and generally always on public works projects) a potential prime contractor must post a bid bond when it submits a bid. (In this case, the amount of that bond was ten (10%) percent of the bid submitted.) If such a bidder refuses to enter into a contract after it receives the award, or if it cannot obtain an adequate performance bond, then its bid bond is subject to forfeiture. *See*, Lambert & White, § 2.9.3 at 38; § 2.12 at 42-43; § 8.3 at 132-134. Second, a prime contractor must provide a performance bond for the full price of the entire construction project. *See*, *Id.* § 8.4 at 134-135. Third, it must also possess the ability to advance payments to numerous subcontractors and suppliers before receiving payments from the owner. Because of these requirements, the mere fact that an owner places a company on its bid list does not necessarily mean that the company is capable of submitting a prime contract bid.

It may be that after procuring project plans and making an estimate of the project's cost from those plans, a company listed as a potential prime contractor will discover that it is incapable of bidding on the prime contract. It is common industry practice for such a company to elect to assume the role of subcontractor and submit a price for only a portion of the project to a company that is able to bid the prime contract. When a potential prime contractor makes this election, the number of potential subcontractors is increased thereby increasing competition among subcontractors. *See*, W.R. Park, *Construction Bidding for Profit*, pp. 211-236 (1979).

Thus, the structure of the construction industry generates the maximum amount of possible competition. It allows companies that cannot increase competition in the prime contract market to, nevertheless, increase competition in the subcontract market. *See*, Lambert & White, § 1.1 at 21 ("Competition is the hallmark of the construction industry, and competition is vigorously fostered by the unique structure of the industry").

Under the holding of this case, companies that cannot bid on the prime contract and elect to bid as subcontractors are subjected to *per se* scrutiny under the Sherman Act. Because the rule enunciated in this case will effectively "chill" potential prime contractors from bidding as subcontractors, it will reduce the number of companies competing in the subcontract market. Thus, the application of the *per se* rule does not protect and foster competition, the Sherman Act's primary goal. *See*, Carey, *The Sherman Act: What Did Congress Intend?*, 34 Antitrust Bull. 337, 356 (1989) (Based on a examination of its Congressional history, the author surmises that one of Congress' guidelines for drafting and enacting the Sherman Act was that "[t]he market should be comprised of many competitors.").

b. The Arbitrary Application of the *Per Se* Rule in This Case Reduces the Efficiency of the Construction Industry.

This Court has recognized that the protection of market efficiency is another aim of the Sherman Act. *See*, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979) ("BMI") ("More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on . . . whether the practice appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to '*create economic efficiency* and render markets more, rather than less, competitive.' ") (citations omitted) (emphasis added); *Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623, 95 S.Ct. 1830, 1835, 44 L.Ed.2d

418 (1975) ("Moreover, competition based on *efficiency* is the positive value that the antitrust laws strive to protect.") (emphasis added); Liebeler, *1984 Economic Review of Antitrust Developments: Horizontal Restrictions, Efficiency and the Per Se Rule*, 33 U.C.L.A. L. Rev. 1019 (1986) ("In the Late 1970's, the Supreme Court moved sharply toward an antitrust policy based explicitly on *efficiency* considerations.") (emphasis added).

The efficiency of the construction industry derives from the inherent flexibility of its multi-tiered structure. Without regard to its usual position on the contractual ladder, that structure allows a company to bid on any contract or portion thereof provided it is capable of performing the work. One result is that prime contractors are usually presented with a field of subcontractor candidates that consists of most, if not all, of the companies in a particular market that may be capable of undertaking the subcontract at hand. This field of candidates provides prime contractors with the greatest possible number of bids, each made up of the following relevant and varying factors: price, scope of work covered, experience, stability and reputation. From the bids, a prime contractor is able to select the subcontract bid that represents the most efficient combination of those factors available in a particular market. *See*, Lambert & White, § 3.3 at 51.

The holding of the courts below impedes the the industry's multi-tiered structure and, thereby, reduces efficiency. As discussed above, it "chills" a potential prime contractor from bidding on a subcontract. The holding can bar the company most capable of efficiently performing a subcontract from bidding on a subcontract. That bar is arbitrary because it rests solely on the fact that the most efficient company may have been considered a potential prime contractor. This arbitrary exclusion of the most efficient company is directly at odds with the efficiency aims of the Sherman Act. It is precisely this kind of result that has brought forth the hue and cry for complete abolition of the *per se* rule. *See e.g.*, Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 Yale L. J. 706 (1983).

In this case, the *per se* rule fosters inefficiency. Fischbach, the prime contractor, had the financial resources necessary to bond and finance the $21 million Big Cajun project. However, Fischbach did not have the expertise and experience necessary to perform the testing and instrumentation phases of the project. In contrast, MMR did not have the financial resources to bid as a prime contractor and was only a potential subcontractor. MMR notified Cajun Electric of this fact by letter prior to the bid date. MMR's **"principal experience and expertise was in instrumentation work, which involves installing and testing the instruments that measure temperature, pressure, flow, and various processes in power plants and other industrial facilities."** 907 F.2d at 492 (Appendix, p. 17a). Accordingly, MMR submitted a subcontract bid for the testing and instrumentation that was much broader in scope than the bids submitted to Fischbach by other potential subcontractors. Because of MMR's experience, expertise, the scope of its bid and its price, Fischbach determined that MMR could perform the testing and instrumentation subcontract work with greater overall efficiency than MMR's competitors. Oblivious to that efficiency, when the courts below found a Sherman Act violation among the prime contract bidders, they applied the irrebuttable presumption of *per se* liability to a subcontractor, MMR. Thus, they condemned efficiency *per se*.

2. Contrary to This Court's Established Jurisprudence, the Courts Below Expanded the *Per Se* Rule By Indiscriminately Applying It to Mr. Rutland and MMR, Who Were Not Competitors.

a. The Courts Below Did Not Engage in the Threshold Analysis Required by This Court and, Thus, Indiscriminately Applied the *Per Se* Rule.

Under the Sherman Act, 15 U.S.C. § 1, application of the "rule of reason" is the norm: **"Since the early years of this century, a judicial gloss on the statutory language has estab-**

lished the 'rule of reason' as the prevailing standard of analysis." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977) ("GTE") (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L. Ed. 619 (1911)); see also, *Business Electronics*, 485 U.S. at 726, 108 S.Ct. at 1520, 99 L. Ed.2d 808 ("there is a presumption in favor of the rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect"). Application of the *per se* rule is the exception. It is justified only in particularly egregious situations: **"*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."** *Id.*

"[D]eparture from the rule-of-reason must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *GTE*, 433 U.S. at 59-60, 97 S.Ct. at 2562. **"The decision to apply the *per se* rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.' "** *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 2617, 86 L.Ed.2d 202 (1985) ("Pacific Stationery") (quoting, *BMI*, 441 U.S. at 19-20, 99 S.Ct. at 1562-1563, 60 L.Ed.2d 1 (1979)); see also, *National Collegiate Athletic Ass'n. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103-104, 104 S.Ct. 2948, 2961-2962, 82 L.Ed.2d 70 (1984) ("NCAA"); but cf., *F.T.C. v. Superior Court Trial Lawyers Ass'n*, ____ U.S. ____, 110 S.Ct 768, 107 L.Ed.2d 851 (1990). Under *Pacific Stationery*, *BMI*, *NCAA* and *GTE*, a court must conduct a threshold inquiry into the economic effect of allegedly restrictive activity rather than perfunctorily apply the onerous rule of *per se* liability.

The courts below did not conduct the required facial inquiry. They failed to determine whether Mr. Rutland and MMR's alleged activity would always or almost always tend

to restrict competition and decrease output or whether it could increase economic efficiency and render markets more, rather than less, competitive.

Mr. Rutland's alleged conduct "would not always or almost always tend to restrict competition and decrease output." MMR did not have the financial ability to obtain the requisite bonding for Big Cajun. It was not a competitor for that project. Even assuming *arguendo* that the noncompetitors, MMR and Mr. Rutland, at some point participated in a conspiracy which was otherwise composed of competitors (a fact which the trial court erroneously did not require the jury to find), the participation of MMR and Mr. Rutland could only have been meaningless. *See*, *United States v. Sargent Elec. Co.*, 785 F.2d 1123, 1127 (3rd Cir. 1986), *cert. denied*, 479 U.S. 819, 107 S.Ct. 82, 93 L.Ed. 36 (1986) (An agreement to rig bids among persons who are not actual or potential competitors "is meaningless for Sherman Act purposes."); *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433, 443, 445 (M.D. Tenn. 1982) ("Unless the offending group consists of competitors, a bid-rigging scheme lacks any utility.")

Mr. Rutland does not suggest that the alleged conspiracy amongst Fischbach and its competitors was meaningless. However, Mr. Rutland's and MMR's alleged participation in such a conspiracy could only have been meaningless. Mr. Rutland and MMR could not compete and, therefore, were powerless to disrupt free market forces. Because they were powerless, their alleged agreement not to compete could have no effect on the market. The alleged agreement could not **"restrict competition and decrease output."**

In counterpoint, Mr. Rutland's and MMR's activities promoted market efficiency and competition. *See*, § II(A), *supra*. Mr. Rutland's alleged conduct, thus, had beneficial effects that should have been evaluated under the rule of reason.

Mr. Rutland's alleged conduct neither restricted competition nor decreased market output. On the contrary, it fos-

tered competition and market efficiency. It also allocated the expertise and resources of Fischbach and MMR in a manner that achieved maximum efficiency from the available resources. If the courts below had conducted the threshold inquiry required by this Court, Mr. Rutland and MMR would not have been judged by the harsh and exceptional rule of *per se* liability.

b. This Case Presents an Unjust Expansion of the Harsh Rule of *Per Se* Liability.

Traditionally, price fixing agreements among competitors—i.e. horizontal restraints—have been automatically subject to the rule of *per se* liability. *See e.g., United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). More recently, however, this Court has recognized the inflexibility of the *per se* rule. *See, BMI*, 441 U.S. at 17, 99 S.Ct. at 1561, 60 L.Ed.2d 1 ("[I]t seems to us that the *per se* rule does not accommodate itself to such flexibility. . . .") The "easy label" of *per se* liability does "not always supply ready answers." *BMI*, 441 U.S. at 8, 99 S.Ct. at 1556, 60 L.Ed.2d 1. This Court has referred to the blind application of that rule as "formalistic line drawing." *GTE*, 433 U.S. at 59, 97 S.Ct. at 2562. It has expressly eschewed expansion of the *per se* rule. *See, Continental T.V., Inc.*, 433 U.S. at 57, 97 S.Ct. at 2561, 53 L.Ed.2d 568 ("[W]e have found no persuasive support for expanding the *per se* rule.")

Contrary to this Court's recent admonitions, the courts below extended the *per se* rule and applied it to Mr. Rutland and MMR, who are noncompetitors. 907 F.2d at 498 (Appendix, p. 28a). Without citing a single authority, the court of appeals held that **"a noncompetitor can join a Sherman Act bid-rigging conspiracy among competitors."** *Id.* The court did not even consider whether the application of *per se* liability in this case constituted an unjustified expansion of that rule. It simply bootstrapped the application of *per se* liability to Mr. Rutland and MMR, who were not competitors, onto

the horizontal conspiracy that existed between Fischbach and its competitors.

The court of appeals' application of the *per se* rule to Mr. Rutland and MMR was unjustified and unprecedented. Hence, it did not, and could not, cite any authority for the proposition that a noncompetitor can become a member of a horizontal price fixing conspiracy and *ipso facto* be subject to the rule of *per se* liability. The decision of the courts below impermissibly stretches the reach of that harsh and exceptional rule. It also squarely conflicts with this Court's well-reasoned jurisprudence and must not be allowed to stand.

3. The General Verdict in This Case Must Be Reversed Because One of the Two Alternate Grounds for Mr. Rutland's Conviction Was Faulty.

A conviction based on a general verdict must be reversed whenever one of two or more alternative grounds for the conviction is faulty. *Mills v. Maryland*, 486 U.S. 367, 376, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988); *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983); *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1072-1073, 1 L.Ed.2d 1356 (1957), *overruled on different grounds*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Williams v. State of North Carolina*, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279 (1942); *Stromberg v. People of State of California*, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).

Mr. Rutland was indicted on two alternative grounds: (1) violating the Sherman Act as a principal; or, (2) aiding and abetting a violation of the Sherman Act. With respect to the charge of violating the Sherman Act as a principal, the trial court only instructed the jury that if it found that an agreement not to compete existed then it must find that Mr. Rutland committed a *per se* violation of the Sherman Act. Mr. Rutland's conviction as a principal could only rest on the faulty ground of *per se* liability. Thus, one of the alternate grounds upon which Mr. Rutland's conviction rests is faulty.

The jury in this case returned a general verdict. It did not specify whether Mr. Rutland was convicted as a principal or an aider and abettor. Under *Mills*, *Zant*, *Yates*, *Williams* and *Stromberg*, this case must be reversed even if Mr. Rutland could have been convicted as an aider and abettor.

Because the mail fraud counts were based upon the same *per se* violation, those counts must also be reversed.

X. CONCLUSION

For the reasons set forth above, this Petition for Certiorari should be granted.

Respectfully submitted,

/s/ DONALD L. BECKNER

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APPENDIX

XI. APPENDIX

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CRIMINAL DOCKET NO. 88-559
SECTION MAG. 1
VIOLATIONS: 15 U.S.C. § 1
18 U.S.C. § 2
18 U.S.C. § 1341

UNITED STATES OF AMERICA

—v.—

MMR CORP. (LA); ALFRED R. MANVILLE;
ROBERT P. MCCRACKEN; and JAMES B. RUTLAND,

Defendants

INDICTMENT

COUNT ONE
(15 U.S.C. § 1 and 18 U.S.C. § 2)

The Grand Jury charges:

1. MMR CORP. (LA), ALFRED R. MANVILLE, ROBERT P. MCCRACKEN and JAMES B. RUTLAND are indicted and made defendants herein.

2. Beginning at least as early as December 1980 and continuing at least through August 1984, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators formed, joined and participated in a combination and conspiracy to rig bids for the award and performance of an electrical construction contract known as Contract G3-82 on the Big Cajun No. 2 Power Station, Unit

No. 3 near New Roads, Louisiana. The combination and conspiracy unreasonably restrained interstate trade and commerce, in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Antitrust Act.

DEFENDANTS AND CO-CONSPIRATORS

3. MMR CORP. (LA) is a corporation organized under the laws of the State of Louisiana with headquarters in Baton Rouge, Louisiana, and is a wholly-owned subsidiary of MMR Holdings, Inc., which is also a corporation organized under the laws of the State of Louisiana with headquarters in Baton Rouge, Louisiana. Prior to January 1988, MMR CORP. (LA) was known as Matthews-McCracken-Rutland Corp. As used herein, the term "MMR" describes the corporation under its former and present names. During the period of time covered by this indictment, MMR engaged in the electrical construction contracting business in various parts of the United States, including the Eastern District of Louisiana.

4. ALFRED R. MANVILLE was, during all or part of the period of time covered by this indictment, president and chief executive officer of Fischbach and Moore, Incorporated ("Fischbach") and president and chief executive officer of Fischbach Corporation. Fischbach is a corporation organized under the laws of the State of New York with headquarters in Dallas, Texas and is a wholly-owned subsidiary of Fischbach Corporation, which is headquartered in New York, New York. During the period of time covered by this indictment, Fischbach engaged in the electrical construction contracting business throughout the United States, including the Eastern District of Louisiana, where it maintained an office in Kenner.

5. ROBERT P. McCRACKEN was, during all or part of the Period of time covered by this indictment, chairman of MMR.

6. JAMES B. RUTLAND was, during all or part of the period of time covered by this indictment, president and chief operating officer of MMR.

7. Various corporations and individuals, not named as defendants, participated as co-conspirators in the offenses charged in this indictment, and performed acts and made statements in furtherance thereof.

8. Wherever in this indictment reference is made to any act, deed or transaction of a corporation, the allegation means that the corporation engaged in the act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

THE BIG CAJUN PROJECT

9. Cajun Electric Power Cooperative, Inc. ("Cajun Electric") is a nonprofit electric generation and transmission cooperative with headquarters in Baton Rouge, Louisiana. Cajun Electric provides wholesale electric service to its member transmission cooperatives, which in turn provide wholesale electric power to distribution cooperatives that are engaged in the retail sale of electricity to industrial, residential and commercial customers.

10. Beginning in 1979, Cajun Electric undertook the construction of the Big Cajun No. 2 Power Station, Unit No. 3 ("Big Cajun Station"), an electric generating plant located near New Roads, Louisiana.

11. The construction of the Big Cajun Station, including electrical work designated as Contract G3-82, was to be financed by the United States through a loan to Cajun Electric from the Federal Financing Bank, a part of the Department of the Treasury, which was guaranteed by the Rural Electrification Administration ("REA"), a part of the United States Department of Agriculture.

12. Pursuant to its loan guarantee program, the REA promulgates regulations requiring the use of competitive bidding procedures for the purchase and installation of materials and equipment for generation facilities such as the Big Cajun Station. The REA also requires that each bidder for REA-supported construction warrant in its bid proposal that its bid is made in good faith and without collusion.

13. In or about November 1980, Cajun Electric, through its engineer, Burns & Roe, Inc. ("BRI"), invited seven electrical contractors to submit sealed, competitive bids for the electrical work required for Contract G3-82 on the Big Cajun Station. The invitation for competitive bids was designed to promote competition among qualified electrical contractors in order to obtain responsive bids at the lowest possible price for electrical construction under Contract G3-82. Six potential bidders responded to the invitations by sending representatives to a pre-bid meeting at BRI's office in Woodbury, New York on or about December 16, 1980. The firms represented at that meeting were defendant MMR, Fischbach, Lord Electric Company, Inc. ("Lord"), The Howard P. Foley Company ("Foley Company"), L. K. Comstock & Company, Inc. ("Comstock") and Hatzel & Buehler, Inc. ("H&B").

14. Bids on Contract G3-82 were due on January 16, 1981. On or about that date four electrical construction contractors—Fischbach, Lord, Foley Company and H&B—submitted bids to Cajun Electric and BRI.

15. After the bids were received and evaluated, and the bidders given an opportunity to change their bid prices, Cajun Electric's Board of Directors voted on February 23, 1981 to award Contract G3-82 to Fischbach. The total amount of the contract was approximately $21.3 million.

16. In performing Contract G3-82, Fischbach submitted progress reports to BRI requesting payment for certain portions of work performed. Cajun Electric periodically requested payment of loan funds guaranteed by the REA in order to make payments for the construction of the Big

Cajun Station, including Contract G3-82. Upon approval by REA of these requests, funds were wired in interstate commerce for deposit in Cajun Electric's bank in Louisiana. In turn, Cajun Electric made progress payments to Fischbach for work performed on Contract G3-82.

BACKGROUND OF THE CONSPIRACY

17. On or about March 18, 1980, at the Warwick Hotel in New York, New York, in a suite leased to Lord, representatives of Fischbach, Lord, Foley Company, and another electrical construction contractor discussed the possible allocation of several power plant construction contracts, including Contract G3-82, to various electrical construction contractors.

18. On or about April 20-21, 1980, at the Seaview Country Club in Absecon, New Jersey, defendant ALFRED R. MANVILLE told a group of electrical construction company executives, including representatives of Lord and Foley Company, that electrical construction contractors should restrict competition among themselves for power plant construction contracts.

DESCRIPTION OF THE CONSPIRACY

19. The charged conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators to rig bids, the substantial terms of which were that:

(a) Fischbach would submit the lowest bid to Cajun Electric for Contract G3-82;

(b) defendant MMR and the co-conspirator companies would submit collusive, noncompetitive and rigged bids to Cajun Electric for Contract G3-82, or would not submit bids;

(c) in return for the participation in the conspiracy by defendants MMR, ROBERT P. McCRACKEN and

JAMES B. RUTLAND, MMR would be awarded a subcontract by Fischbach to perform a portion of the work described by Contract G3-82;

(d) Fischbach would perform the electrical construction work and receive payments from Cajun Electric under Contract G3-82; and

(e) Fischbach would make payments to MMR pursuant to the subcontract.

MEANS AND METHODS OF THE CONSPIRACY

20. For the purpose of forming and carrying out the charged conspiracy, the defendants and co-conspirators did those things that they combined and conspired to do, including among other things:

(a) In or about December 1980, defendant ALFRED R. MANVILLE told Paul B. Murphy, the Southern Division president of Fischbach, in Kenner, Louisiana, that, based on certain conversations he had had, he believed Fischbach could obtain the agreement of four of the potential bidders for Contract G3-82 not to compete for the award of Contract G3-82; defendant MANVILLE suggested that Murphy attempt to determine whether defendant MMR—a potential bidder—also would agree not to compete for Contract G3-82;

(b) On or about December 19, 1980, at the City Club in Baton Rouge, Louisiana, Paul B. Murphy and J. R. Sturgill, Jr., Fischbach's New Orleans area branch manager, met with defendants ROBERT P. McCRACKEN and JAMES B. RUTLAND to discuss Contract G3-82 and other matters; during that meeting, Murphy related to defendants McCRACKEN and RUTLAND the information provided to him by defendant ALFRED R. MANVILLE regarding the likelihood that Fischbach could obtain the agreement of the other potential bid-

ders not to compete for Contract G3-82; during the meeting, Murphy requested that defendants McCRACKEN and RUTLAND agree that defendant MMR would not compete for Contract G3-82; prior to the conclusion of the meeting, defendants McCRACKEN and RUTLAND reached the following understanding and agreement with Murphy and Sturgill:

(1) that defendant MMR would not compete for the award of Contract G3-82 and would, instead, submit a high, complementary bid to support Fischbach's bid;

(2) that in consideration for defendant MMR's agreement not to compete, Fischbach would award MMR a lucrative subcontract under Contract G3-82, the precise terms of which would be negotiated later;

(3) that defendant MMR would cancel or "clear" Fischbach's obligations to defendant MMR, incurred as a result of MMR's prior agreements not to compete for the award of electrical construction contracts at Borden Chemical Company in Geismer, Louisiana and at Freeport Uranium Recovery Company in Faustina, Louisiana; and

(4) that MMR would pay Fischbach $250,000 in consideration for Fischbach's prior agreement not to compete against MMR for the award of an electrical construction contract at the Strategic Petroleum Reserve in West Hackberry, Louisiana;

(c) In or about December 1980 or January 1981, defendant ALFRED R. MANVILLE told Paul B. Murphy, in Kenner, Louisiana, the names of the persons at Lord, Foley Company, Comstock and H&B to whom Murphy should communicate price information to enable those companies to submit

collusive, noncompetitive and rigged bids to Cajun Electric for Contract G3-82;

(d) In or about January 1981, Paul B. Murphy, while in Kenner, Louisiana, communicated to representatives of Lord, Foley Company, Comstock, H&B and MMR the price each firm should bid for Contract G3-82;

(e) In or about January 1981, defendant JAMES B. RUTLAND told one or more representatives of Fischbach that he objected to submitting the highest of all the bids which Cajun Electric would receive from the defendant and co-conspirator companies for Contract G3-82;

(f) In or about January 1981, J. R. Sturgill, Jr. told defendant JAMES B. RUTLAND that MMR could fulfill its agreement not to compete for the award of Contract G3-82 by not submitting a bid for the contract;

(g) On or about January 15, 1981, defendant MMR sent Cajun Electric a letter indicating that it would not submit a bid for Contract G3-82;

(h) On or about January 16, 1981, Fischbach, Lord, Foley Company and H&B submitted collusive, noncompetitive and rigged bids to Cajun Electric for Contract G3-82;

(i) In or about April/May 1981, defendant JAMES B. RUTLAND and J. R. Sturgill, Jr. agreed on the terms of the lucrative subcontract which defendant MMR had been promised in exchange for MMR's agreement not to compete for the award of Contract G3-82; this agreement (as reflected, in part, in a one-page memorandum prepared by defendant RUTLAND) called for defendant MMR to be awarded a $3,353,487 subcontract and to receive an additional $1,000,000 pursuant to a change order on or before May 1, 1983;

(j) On or about May 14, 1981, defendant MMR entered into a $3,353,487 subcontract with Fischbach to perform certain work under Contract G3-82;

(k) On or about November 30, 1981, J. R. Sturgill, Jr., while in Kenner, Louisiana, caused Change Order "C" in the amount of $1,120,000 to be issued by Fischbach to defendant MMR;

(l) Between approximately March 1981 and August 1984, Fischbach performed the electrical construction work and received payments from Cajun Electric under Contract G3-82, said payments continuing until in or about August 1984; and

(m) Between approximately March 1982 and August 1984, defendant MMR performed the work described in the subcontract with Fischbach and received payments from Fischbach under the subcontract, said payments continuing until in or about August 1984.

TRADE AND COMMERCE

21. During the period of time covered by this indictment, essential equipment, materials and supplies were shipped into the State of Louisiana from points of origin outside the State of Louisiana in a continuous and uninterrupted flow of interstate commerce for use on Contract G3-82.

22. During the period of time covered by this indictment, federal funds were wired in interstate commerce for deposit in Cajun Electric's local bank in Louisiana. Progress payments were then made by Cajun Electric to Fischbach for work performed on Contract G3-82.

23. The activities of the defendants and co-conspirators, which are the subject of this indictment, were within the flow of and substantially affected interstate commerce.

JURISDICTION AND VENUE

24. The charged conspiracy was carried out, in part, within the Eastern District of Louisiana within the five years preceding the return of this indictment.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1, AND TITLE 18, UNITED STATES CODE, SECTION 2.

COUNTS TWO THROUGH FOUR
(18 U.S.C. §§ 1341 and 2)

The Grand Jury further charges:

25. Each and every allegation contained in paragraph 1 and in paragraphs 3 through 18, inclusive, of Count One of this indictment is here realleged with the same full force and effect as though said paragraphs were set forth in full detail.

26. Beginning in or about December 1980 and continuing thereafter until at least August 1984, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators devised and intended to devise a scheme and artifice to defraud Cajun Electric and the United States of money and property.

27. It was part of the charged scheme and artifice to defraud that the defendants and co-conspirators, known and unknown to the Grand Jury, would submit collusive, non-competitive and rigged bids, or would not bid, in order to induce Cajun Electric to award Contract G3-82 to Fischbach.

28. On or about the dates of mailing set forth below, for the purpose of executing and carrying out the scheme and artifice to defraud, and attempting to do so, the defendants and co-conspirators did knowingly cause the checks listed below to be delivered by mail by the United States Postal Service according to the directions thereon, to an address within the Eastern District of Louisiana, each such use of the

mails constituting a separate violation of Title 18, United States Code, Sections 1341 and 2:

COUNT TWO

Instrument:	Check No. 31984 from Cajun Electric to Fischbach, dated May 6, 1984, in the amount of $573,435.97
Addressed from:	Cajun Electric Power Cooperative, Inc. P. O. Box 15540 Baton Rouge, Louisiana 70895
Addressed to:	Fischbach and Moore Inc. P. O. Box 1608 Kenner, Louisiana 70063
Mailed on or about:	May 6, 1984

COUNT THREE

Instrument:	Check No. 33337 from Cajun Electric to Fischbach, dated June 18, 1984, in the amount of $1,052,951.45
Addressed from:	Cajun Electric Power Cooperative, Inc. P. O. Box 15540 Baton Rouge, Louisiana 70895
Addressed to:	Fischbach and Moore Inc. P. O. Box 1608 Kenner, Louisiana 70063
Mailed on or about:	June 18, 1984

COUNT FOUR

Instrument:	Check No. 34529 from Cajun Electric to Fischbach, dated July 27, 1984, in the amount of $1,092,271.71

Addressed from:	Cajun Electric Power Cooperative, Inc. P. O. Box 15540 Baton Rouge, Louisiana 70895
Addressed to:	Fischbach & Moore, Inc. P. O. Box 1608 Kenner, Louisiana 70063
Mailed on or about:	July 31, 1984

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTIONS 1341 AND 2.

A TRUE BILL

Dated:

[Illegible]
FOREPERSON

/s/ CHARLES F. RULE
CHARLES F. RULE
Assistant Attorney General

/s/ JOSEPH H. WIDMAR
JOSEPH H. WIDMAR

/s/ ANTHONY V. NANNI
ANTHONY V. NANNI
Attorneys, Antitrust Division
U.S. Department of Justice

/s/ JOHN VOLZ
JOHN VOLZ
United States Attorney
Eastern District of Louisiana

/s/ HAYS GOREY, JR.
HAYS GOREY, JR.

/s/ STUART A. BERMAN
STUART A. BERMAN

Attorneys
U.S. Department of Justice
Antitrust Division,
Room 10-411
555 4th Street, N.W.
Washington, D.C. 20001
(202) 724-6809

43. WITHDRAWAL FROM THE CONSPIRACY

The defendants have raised the defense that they were not members of the conspiracy because they withdrew from the conspiracy when they notified CEPCO and the alleged co-conspirators that MMR was not going to bid on the Big Cajun contract. The government contends that the defendants continued to be members of the conspiracy after that date.

Once a person joins a conspiracy, that person remains a member until he withdraws from it. Any withdrawal must be complete and it must be done in good faith.

A person can withdraw from a conspiracy by taking some affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. In other words, the defendants must have demonstrated some type of positive action which disavowed or defeated the purpose of the conspiracy.

By way of example, a defendant may withdraw from a conspiracy by doing acts which are inconsistent with the object of the conspiracy and making reasonable efforts to communicate those acts to his co-conspirators. To withdraw from a conspiracy there is no requirement that a defendant try to convince the other co-conspirators to abandon their undertaking, or that he go to public authorities or others to expose the conspiracy or to prevent the carrying out of an act involved in the conspiracy.

In this regard, you are reminded that the burden remains on the government to prove, beyond a reasonable doubt, that the defendants were members of the conspiracy and did not withdraw from it.

AUTHORITY:

MFJI 19-10, p.19-50.2

United States v. Read, 658 F.2d 1225, 1231 (7th Cir. 1981).

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

Docket No. CR. 88-559-I

UNITED STATES OF AMERICA,

vs.

JAMES B. RUTLAND,
SS 433-82-0138
19513 N. Muirfield
Baton Rouge, La. 70818

Defendant.

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 28 1989.

COUNSEL:
John Martzell

COURT REPORTER:
Sally Kohn

PLEA:
NOT GUILTY

FINDING & JUDGMENT:
There being a verdict of GUILTY on 5-11-89 as to Counts 1, 2, 3 and 4. Defendant has been convicted as charged of the offenses of violation of 15 USC 1, 18 USC 2 and 18 USC 1341 RESTRAIN INTERSTATE TRADE & COMMERCE IN VIOLATION OF SHERMAN ANTITRUST ACT, AIDING AND ABETTING AND MAIL FRAUD

As charged in the indictment

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and order that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) months as to each of Counts 1 and 2 with said terms of imprisonment to run concurrently.

Counts 3 and 4: The imposition of sentence as to incarceration is suspended and the defendant is placed on probation for a period of five (5) years as to each count to run concurrently and to begin upon defendant's release from incarceration. As a special condition of the probationary period for Counts 3 and 4, the defendant shall perform 400 hours of community service work during the first two (2) years of the probationary period.

IT IS FURTHER ORDERED that as to Count 1, the defendant is fined the sum of $100,000.00. As to Counts 2, 3 and 4, the defendant is fined a sum of $1,000.00 as to each count for total fines as to all four counts amounting to $103,000.00. Said fines are to be paid within 30 days.

DATE OF ENTRY: AUG 02 1989

SIGNED BY

/s/ HENRY A. MENTZ, JR.
HENRY A. MENTZ, JR.
U.S. District Judge

Date JULY 28, 1989

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3526

(July 23, 1990)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MMR CORPORATION (LA) and JAMES B. RUTLAND,

Defendants-Appellants.

Appeal From the United States District Court
Eastern District of Louisiana

Before

THORNBERRY, GEE, and HIGGINBOTHAM

Circuit Judges.

HIGGINBOTHAM, *Circuit Judge*:

MMR Corporation (LA) and, its president, James B. "Pepper" Rutland, appeal their convictions for conspiracy to rig bids on a Cajun Electric Power Cooperative project in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and for defrauding Cajun Electric on the same project in violation of the mail fraud statute, 18 U.S.C. § 1341. The indictment also charged defendants with aiding and abetting these crimes contrary to 18 U.S.C. § 2.

Defendants attack the convictions on numerous grounds. First they argue that MMR was not a competitor of the

charged co-conspirators and therefore cannot be guilty of a per se violation of the Sherman Act. They next complain of rulings on questions of evidence, comments by the prosecutor and the sufficiency of the evidence. We reject each of these arguments and others that we will describe and affirm both convictions.

I.

Beginning in the late 1970's Cajun Electric, a nonprofit electrical generation and transmission cooperative, decided to construct an electrical generating plant, Big Cajun No. 2 Power Station, at a New Roads, Louisiana site. The power plant was to have three units. The Big Cajun project was sponsored by the Rural Electrification Administration of the United States Department of Agriculture. MMR did not bid on Units 1 and 2 but participated as a joint venturer with Lord Electric Company on the power electrical contracts, primarily by supervising local labor.

In 1979, after construction of Units 1 and 2 was underway, Cajun Electric decided to solicit bids for the construction of Unit 3. Although MMR had never handled a large power electrical project on its own at the time, MMR lobbied Cajun Electric engineers to get on the bid list. Up until this time MMR had primarily been a specialty contractor. Its principal experience and expertise was in instrumentation work, which involves installing and testing the instruments that measure temperature, pressure, flow, and various processes in power plants and other industrial facilities. Because MMR had established a relationship with Cajun Electric, it believed its chances of successfully bidding on Unit 3 were good.

In September 1980 Cajun Electric, through its engineers, prepared a list of seven companies, including MMR, that had demonstrated the financial and technical capability to perform the electrical portion of Unit 3. Six of the invited bidders, including MMR, took out plans and specifications for the project on November 14, 1980, and sent representatives to a pre-bid meeting with Cajun Electric engineers on December 16, 1980. On January 16, 1981, two months later, four of

the six companies submitted bids: Fischbach and Moore, Inc., Lord, The Howard P. Foley Company, and Hatzel & Buehler, Inc. MMR did not submit a bid. Fischbach was the low bidder and was awarded the contract on February 23, 1981, for $21.3 million. MMR received a $4.3 million subcontract from Fischbach.

The conspiracy which formed the basis for the convictions of MMR and Rutland had its beginnings at least as early as March 1980 when Paul Murphy, a Regional Vice-President of Fischbach, met with other representatives of the nation's largest electrical contractors. This was nothing new. These companies had been, for several years, rigging bids for large projects throughout the country. At this meeting they began the process of allocating upcoming electrical projects. Murphy expressed interest in Unit 3. In mid-December 1980, Fischbach's President, Alfred Manville, told Murphy that he had spoken to other potential bidders on the project and that they had agreed to rig the job in favor of Fischbach if Fischbach could get the one remaining bidder, MMR, to go along.

Murphy then called Rutland to arrange a meeting. Murphy had known Rutland for some time and had recently been negotiating with Rutland and Robert McCracken, Chairman of MMR, to acquire MMR for Fischbach. Murphy, J. R. Sturgill, another Fischbach official, Rutland, and McCracken were present at this meeting, held on December 19, 1980, at the City Club in Baton Rouge, Louisiana. They first discussed MMR's outstanding obligations on three earlier projects rigged by MMR and Fischbach—Borden Chemical Company, Freeport Uraniam Recovery Company, and Strategic Petroleum Reserve. Rutland's notes from the meeting referred to the Borden and Freeport "agreement[s]" being "cleared" and to MMR owing Fischbach $250,000 on the SPR "agreement." Murphy then told Rutland and McCracken that the other bidders had agreed to rig the job in favor of Fischbach if MMR would support Fischbach. In response Rutland indicated his strong belief that MMR, though it was a much smaller company and though it had never performed a large electrical contracting job alone,

could do the work and proposed a joint venture. Murphy would not agree to a joint venture.

Rutland went to the men's room and Murphy followed. According to Murphy, he and Rutland worked out a deal in the men's room that MMR would get an instrumentation subcontract with a mark-up proportional to Fischbach's mark-up on the rigged project. When they returned they told Sturgill and McCracken that they had struck a deal. Murphy, however, did not testify to MMR's specific obligations under the agreement although it was clear from his testimony that he believed Rutland agreed that MMR would not compete but instead cooperate with Fischbach. Rutland's notes of the discussion of Unit 3 refer to bidding the job as a joint venture and to MMR having the "option" of subcontracting.

Murphy testified that MMR agreed to prepare a legitimate cost estimate so that Fischbach could compare its estimate to be sure that Fischbach's estimators had not made any mistakes. On January 14, 1981, two days before bids were due, Rutland brought his chief estimator to Fischbach's offices. While Rutland met with Sturgill and Murphy, MMR's and Fischbach's estimators met.

At the January 14 meeting Murphy had a telephone conversation with Pete Matthews of Lord about what number MMR should bid. They decided that MMR should be the high bidder, primarily because if MMR's bid was close to Fischbach's, MMR might get the job because of its good relationship with Cajun Electric. Murphy told Rutland and McCracken what number he wanted MMR to bid. Rutland was embarrassed to submit the number suggested by Murphy because it was much greater than MMR's estimated bid. Rutland feared that submitting such a bid would ruin MMR's image with Cajun Electric. Murphy testified that at the end of the meeting he still believed that MMR, although unhappy about it, was going to submit the high bid.

According to Sturgill, he and Murphy discussed the idea of MMR not submitting a bid at all, and Murphy later told him that MMR agreed to not submit a bid. Murphy, however, testified that he did not know that MMR would not bid until after the bid date. Either after the meeting or the next day,

Rutland informed Cajun Electric by phone that MMR would not be submitting a bid. Rutland wrote a letter to the President of Cajun Electric confirming that MMR had decided not to bid the job, but to seek work as a subcontractor. Meanwhile, Fischbach padded its costs, raised its markup from $3.5 to $6 million, and was awarded the contract for $21.3 million. Sturgill and Rutland then worked out the terms of MMR's subcontract.

According to Sturgill, he and Rutland agreed that MMR would get $2,853,487 for its costs plus a $1,500,000 fee for a total of $4,353,487. Fischbach, however, was required to report all subcontracts to Cajun Electric and the REA. Because the markup on the MMR subcontract was 60%, Sturgill was concerned that the subcontract amount would appear too high to Cajun Electric and the REA. Thus, Sturgill and Rutland agreed that the written subcontract would be for $3,353,487, but that an additional $1 million would be paid to MMR pursuant to a change order purporting to reflect additional work. Change orders were not seen by Cajun Electric or the REA. A handwritten note on MMR memo paper initialed by Sturgill and Rutland confirmed Sturgill's testimony. The subcontract that went to REA in August 1981 showed a price of $3,353,487. In November 1981 the change order was executed by Sturgill.

A bid on Unit 3 required a bid bond or a certified check in the amount of 10% of the bid. A bidder unable to obtain a performance bond would forfeit the bid bond or check. Cajun Electric and MMR initially estimated the job to cost approximately $11 million, about the same cost as Units 1 and 2 together, and within MMR's bonding capacity. At the January 14 meeting Murphy, Sturgill, McCracken, and Rutland agreed that the project cost was actually around $17 million. Cajun Electric engineers later concluded that the actual cost of the project was at least $18.6 million. There was testimony that both of these figures exceeded the limits of MMR's bonding capacity, effectively precluding MMR from

bidding on Unit 3,[1] although it is unclear whether MMR officials were aware that they probably could not obtain bonding before the pivotal December 19 meeting.

Count I of the indictment charged Rutland and MMR with joining and aiding and abetting a conspiracy to rig bids on the Cajun Electric project in violation of the Sherman Act, 15 U.S.C. § 1, and 18 U.S.C. § 2. Counts II, III, and IV alleged the same facts and charged Rutland and MMR with joining and aiding and abetting a scheme to defraud Cajun Electric in violation of the mail fraud statute, 18 U.S.C. § 1341, and 18 U.S.C. § 2. The jury convicted MMR and Rutland on all counts. McCracken was also charged, but he was acquitted on all counts. The district court fined MMR $1,000,000 on the antitrust count and $1,000 each on the mail fraud counts. The court sentenced Rutland to six months imprisonment and fined him $103,000.

II.

The indictment charged in count I that Rutland and MMR "joined and participated in a . . . conspiracy to rig bids for the award and performance of [Big Cajun Unit 3]." The indictment described the conspiracy as an agreement that "MMR . . . would submit collusive, noncompetitive and rigged bids . . . or would not submit bids." The indictment further asserted in a section entitled "Means and Method of the Conspiracy" that MMR agreed at the December 19 meeting not to compete but instead to "submit a high, complimentary bid to support Fischbach's bid" in exchange for a "lucrative subcontract . . . , the precise terms of which would be negotiated later." The indictment also alleged that Sturgill told Rutland that MMR could "fulfill its agreement

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1 Theoretically, MMR could have bid even if it could not get a bid bond by submitting a certified check, but because MMR would have forfeited the bid check if its bid was accepted and it was unable to obtain a performance bond, this was not realistic.

not to compete . . . by not submitting a bid for the contract."[2]

Rutland and MMR argue that the indictment alleges two agreements—an initial agreement to submit a high bid and a second agreement to not submit a bid at all and that there is insufficient evidence that they joined the conspiracy. At least one variation of defendant's argument of insufficient evidence rests on its assertion that because the indictment states that MMR agreed to submit a high bid at the December 19 meeting and later to not submit a bid, the government was required to prove beyond a reasonable doubt that Rutland and MMR explicitly agreed to do these particular acts.

We are not persuaded. First, the indictment does not allege two agreements. It alleges a conspiracy to rig bids joined by MMR. It describes MMR's initial obligation under that agreement to be the submitting of a high, complimentary bid and it asserts that the parties later agreed that MMR could fulfill its agreement by not submitting a bid. But it alleges only one agreement. Thus, defendants' argument boils down to a complaint that the government failed to prove MMR's precise obligations under the agreement—whether MMR was obliged to submit a high bid or to not submit a bid at all.

The government, however, is not required to prove a formal, express agreement with all the terms precisely set out and clearly understood by the conspirators. *See American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966); *Gainesville Util. v. Florida Power & Light Co.*, 573 F.2d 292, 301 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). It is enough that the government shows that the defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade. *See Interstate Circuit, Inc.*

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2 Rutland and MMR note that the evidence at trial did not show that Sturgill told Rutland that MMR could fulfill its agreement not to compete by not submitting a bid. Sturgill testified that he and Murphy discussed MMR not submitting a bid and that Murphy told him that MMR had agreed to not submit a bid. Rutland and MMR, however, do not, and could not on this record, contend that this was a material variance between the indictment and the proof at trial.

v. United States, 306 U.S. 208, 227 (1939) (stating that the "[a]cceptance . . . of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act"). Therefore, our question is simply whether there is sufficient evidence that Rutland and MMR accepted the invitation to join the bid-rigging conspiracy.

Viewing the evidence in the light most favorable to the government, as we must, we conclude that there was ample evidence to allow a reasonable jury to conclude that Rutland and MMR agreed to join the conspiracy to rig bids on Unit 3. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Mejia*, 844 F.2d 209, 211-12 (5th Cir. 1988). The evidence shows that Sturgill and Murphy asked Rutland and MMR to join the conspiracy to rig bids on Unit 3 and that, although initially there was resistance, eventually a deal was struck between Murphy and Rutland in the men's room that MMR, in exchange for a lucrative subcontract, would become part of the conspiracy. The evidence also shows that MMR in fact received a lucrative subcontract, providing substantial circumstantial support for the existence of an agreement.

III.

As another variation of their sufficiency argument, the defendants complain that certain testimony by Murphy and Sturgill should not have been admitted because Murphy and Sturgill lacked personal knowledge. In particular, defendants point to Murphy's testimony of his understanding at the end of the January 14 meeting that, while Rutland was unhappy about it, MMR would submit the high bid, and Sturgill's testimony that it was his understanding that, in exchange for a lucrative subcontract, MMR would cooperate with Fischbach in rigging bids on Unit 3. The defendants also challenge testimony of Murphy and Sturgill to the Borden, Freeport, and SPR bid-rigging agreements.

Murphy's testimony about the bid-rigging agreement with Fischbach was admissible. Murphy was a direct party to the agreement with Rutland with personal knowledge of the facts underlying his testimony. Further, Murphy's inferences were rationally based on his perception and helpful to the jury. The defendants complain that Murphy did not testify to the factual basis for the inference he drew. In some special situations it may be necessary to require the lay witness to be able to testify to the factual basis for his or her opinion or inference. *See United States v. Phillips*, 600 F.2d 535, 538-39 (5th Cir. 1979) (stating that where a witness is testifying that the defendant possesses the requisite criminal intent we might require the witness, as a prerequisite to admissibility under Rule 701, to articulate the factual basis for his or her opinion). The general rule, however, is that the lay witness need not be able to testify to the factual basis for his or her opinion. *United States v. Carlock*, 806 F.2d 535, 552 (5th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987). We are not persuaded that a departure from the general rule was warranted in this case. Murphy was a direct participant. He was a negotiator of the terms of joinder of the conspiracy. Allowing him to testify about his understanding or that an agreement was reached is not beyond the trial court's discretion.

Sturgill's testimony about the agreement between MMR and Fischbach is more troubling. Nonetheless, we are persuaded that there was sufficient evidence to support a finding that Sturgill's testimony about the agreement between MMR and Fischbach was based on personal knowledge. We acknowledge that it was Murphy who negotiated the agreement and that Sturgill did testify that he was unsure how he had come to know about the agreement between Murphy and Rutland. But Sturgill had significant contact with Rutland. He was present at both meetings between Fischbach and MMR concerning Big Cajun and negotiated MMR's subcontract. This circumstantial evidence supports a finding that Sturgill had personal knowledge.

We next turn to whether Murphy and Sturgill were competent to testify that the Borden, Freeport, and SPR jobs were rigged. Sturgill was the district manager in New Orleans with

supervisory responsibility for the bids from that office. Moreover, Sturgill's trial testimony disclosed extensive knowledge of these jobs. Nor is it insignificant that Sturgill was privy to discussions about the bid-rigging agreements at the City Club meeting including an argument between McCracken and Murphy over the SPR job and the amount due Fischbach, MMR's "silent" partner in that job.

IV.

Rutland and MMR next argue that the district court erred in not giving a specific instruction requiring the jury to find unanimously either that they agreed to submit a high bid or that they agreed not to bid at all. *See United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). The government asserts that the defendants did not properly preserve an objection to the court's unanimity charge, requiring us to review this claim under the plain error standard. We need not pause to explore the standard of review. Assuming defendants are favored, the district court properly refused a specific unanimity instruction. As we explained, we read the indictment to charge only one agreement and are persuaded that the government need not have proved MMR's precise obligations under that agreement; it needed to prove only that MMR agreed to join the bid-rigging conspiracy. A high bid or no bid on the facts of this case, were means of implementing the charged conspiracy. We are not persuaded that bidding high or backing away from bidding are conceptually distinct means of carrying out an agreement to rig bids. In any event the usual unanimity instruction is sufficient unless ". . . a genuine possibility of juror confusion exists." *United States v. Phillips*, 869 F.2d 1361, 1366 (10th Cir. 1988); *see also United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). We find none.

V.

Defendants challenge the district court's decision to apply per se liability rules. Defendants maintain that even if, as we

have found, there was sufficient evidence that they agreed to join the conspiracy to rig bids on Unit 3, this was not a per se case because MMR was not an actual or potential competitor of Fischbach and the other conspirators. They argue that the evidence shows that MMR could not compete with Fischbach or the other conspirators on Big Cajun Unit 3 because the job greatly exceeded MMR's bonding capacity, precluding it from successfully bidding for the project. They contend that their evidence of lack of bonding capacity compels a finding that MMR was not a competitor of the other conspirators as a matter of law. In the alternative, they argue that the district court erred in refusing to instruct the jury that before it could convict, it must find that MMR was a competitor for the Big Cajun job.

In making this argument the defendants point to various cases which state the unassailable proposition that an agreement among competitors to fix prices is a per se violation of section 1 of the Sherman Act. *See, e.g., United States v. Korfant*, 771 F.2d 660, 663 (2d Cir. 1985); *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 125 (7th Cir. 1978); *United States v. Koppers Co.*, 652 F.2d 290, 293 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979). The defendants, however, rely most heavily on two double jeopardy cases in which defendants challenged a second Sherman Act conspiracy prosecution for bid-rigging. *United States v. Sargent Elec. Co.*, 785 F.2d 1123, 1127 (3d Cir.), *cert. denied*, 479 U.S. 819 (1986); *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433, 443 (M.D. Tenn. 1982). The courts held that the defendants engaged in multiple conspiracies and that the second conspiracy prosecution did not violate the double jeopardy clause because the parties to the conspiracy which formed the basis for the first conviction were not competitors of the parties to the second charged conspiracy.

In *Ashland-Warren* the defendant argued that its trial on bid-rigging charges in Tennessee was barred by its earlier conviction for rigging highway paving jobs in Eastern Virginia. The defendant maintained that the two indictments related to

a single, interstate agreement with the same membership and objectives. The court found, however, that factually there had to be two conspiracies because, with the exception of the defendant, who was capable of competing for jobs in Virginia and Tennessee, the conspirators were only capable of competing in either Tennessee or Virginia but not both. This was because hot asphalt can only be hauled a relatively short distance and only the defendant had a plant in both states. *Id.* The court ruled that because the defendant conspired with a completely different group of competitors in Eastern Virginia, the second prosecution for bid-rigging in Tennessee was not barred by the double jeopardy clause. *Id.* at 445. The court based its ruling on the logic of the per se rule: "Price-fixing is banned because of its actual or potential threat to the 'central nervous system of the economy.' Bid-rigging poses such a threat only when its participants would otherwise be competitors. Unless the offending group consists of competitors, a bid-rigging scheme lacks any utility." *Id.* at 445 (citations omitted).

The Third Circuit arrived at the same result in *Sargent Electric Co.* The court read section 1 of the Sherman Act to require that "[t]he illegal object of the conspiracy . . . be identified in terms of an intended or achieved effect upon commerce in a relevant market." 785 F.2d at 1127. The court noted that the bid-rigging conspiracy in that case was per se illegal and that no inquiry into the competitive effect of the conspiracy was necessary. *Id.* The court, however, concluded that an agreement among persons who are not actual or potential competitors in a relevant market "is meaningless for Sherman Act purposes." *Id.* The court went on to hold that the relevant market for the bid-rigging between the electrical contractor defendants in that case was governed by the bid list for each project, which was not controlled by the conspirators, but by the officials in charge of each project. Based largely on this fact, the court concluded that, as a matter of law, the bid-rigging on the various projects constituted multiple conspiracies. *Id.* at 1131.

The defendants also rely on our opinion in *Transource International, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274 (5th

Cir. 1984). In *Transource* we affirmed summary judgment dismissing antitrust claims arising out of a joint venture relationship between Transource and Trinity. Transource had agreed not to compete with Trinity in the marketing or manufacturing of railcars. When the deal went sour Transource sued Trinity, contending that the agreement was illegal per se. We held that "the district court correctly concluded that Transource and Trinity were not horizontal competitors at the time of the contract" because "Transource's business at this time was the sale of distribution services while Trinity's was manufacturing railcars." *Id.* at 280. We also found that the two companies were not potential competitors because "Transource lacked the financial ability to enter the market at the same level as Trinity and could not have been considered a potential competitor." *Id.*

Sargent, *Ashland-Warren*, and *Transource* stand for the unremarkable proposition that an agreement not to compete between two parties who are not actual or potential competitors is not per se or otherwise illegal because an agreement not to compete between two parties who are not competitors is meaningless. However, even if MMR is deemed not to be an actual or potential competitor of Fischbach and the other companies, the conspiracy was not a meaningless conspiracy between noncompetitors since Fischbach, Lord, and Foley were competitors.

First, a noncompetitor can join a Sherman Act bid-rigging conspiracy among competitors. If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors. Obviously, Rutland is not a competitor. He was a representative of a competitor. Second, the facts of this case illustrate how a company, although arguably unable in fact to carry out its competitive threat, which we will assume, can nonetheless further a conspiracy among competitors. Fischbach was not able to submit an inflated bid with the confidence that it would have no real competition for the project until Fischbach obtained assurance that MMR would not compete. Fischbach feared MMR's relationship with Cajun Electric. The jury could conclude that MMR made sure that Fischbach knew of its rela-

tionship, an effort reinforced by Cajun Electric's inviting MMR to bid. The evidence is compelling that Rutland and MMR agreed to and assisted Fischbach in preparing its deceptive bid. In sum, we conclude that MMR's alleged inability to ultimately get the job because it lacked adequate bonding capacity does not afford Rutland and MMR a defense under section 1 of the Sherman Act both because MMR was a competitive threat and in any event they were properly convicted as an aider and abettor.

VI.

Before trial the government asked the court to direct defense counsel not to argue that the defendants should be acquitted because Fischbach's winning bid was reasonable. *See United States v. Trenton Potteries*, 273 U.S. 392 (1927) (stating that the reasonableness of a fixed price is not relevant, for the only question is whether there was an agreement to fix the price). The court granted the government's motion two months before trial in a one line statement "excluding any argument or evidence that [Fischbach's bid] was 'fair' or 'reasonable.' " When the government attempted to introduce evidence that the Fischbach bid was unreasonable at trial, the defendants objected, pointing to the court's order.

In response the government unnecessarily confused a straightforward, if difficult of application, principle. The costs and profits of a bid are relevant to the question of whether there was an illegal agreement. If there was an agreement to rig it is no defense that the resulting costs and profit of the job were "reasonable." The government confused this idea with its explanation that its pre-trial motion was not an attempt to preclude evidence on the reasonableness of Fischbach's bid, but was rather, to block any argument by defense counsel that the reasonableness of Fischbach's bid was a ground for acquittal. This comes close to a nonsensical suggestion that evidence is admissible but can't be argued, a point one defense counsel made at trial.

Facing this shift in ruling in the middle of trial, defendants requested a mistrial, arguing that they were entitled to have two months, the time period the court's ruling had been in effect, to prepare their evidence on this issue. The court eventually ruled that its prior order would stand, but construed that ruling as only precluding defendants from arguing that Fischbach's bid was reasonable as a ground for acquittal and as not precluding either side from introducing evidence that Fischbach's bid was reasonable on the issue of intent. Thus, the court came back to a defensible application of the principle, with no help from the government. But it did so only in trial. The question we have is then whether the correction of its earlier erroneous ruling in mid-trial came in time to avoid prejudice to the defendants. Defendants forcefully argue that the court precluded them from introducing evidence to rebut the government's evidence, but after carefully reviewing the record we are persuaded that the district court did not prohibit the defendants from offering their own evidence on this issue.

The government took the position throughout the pretrial proceedings that Fischbach's bid was unreasonable. Its intent to introduce evidence on this point was plain. Thus, its motion in limine, odd as it strikes us, sought only to eliminate any *argument* by the defendants that they could be acquitted because Fischbach's bid was reasonable. We have much doubt that the able defense counsel here believed the court's order was intended to preclude the government or the defense from introducing evidence regarding the reasonableness of Fischbach's bid.

Second, and of greater significance, even if the defendants reasonably relied on the letter of the court's original ruling, we are not persuaded that the district court's tardy modification prejudiced the defendants. Defendants requested a mistrial, but they did not request a continuance and never explained to the district court what proof they might offer or how much time they needed. Although they asserted prejudice in general terms, their primary argument was that if the government was allowed to introduce evidence on the reasonableness of Fischbach's bid, they were *entitled* to the two

months the ruling had been in effect. The defendants did not argue that they needed two months. Defendants had sixteen days to prepare rebuttal evidence yet submitted none. Although on appeal the defendants claim that they have substantial evidence to offer on this issue, their failure to offer an evidentiary challenge below suggests the contrary. We suggest no failure of counsel. To the contrary, we read the silence to reflect an absence of amunition, not an absence of able marksmen.

VII.

Rutland and MMR contend that the letter Rutland sent to Cajun Electric on January 15 stating that MMR would not submit a bid raised the issue of withdrawal from the conspiracy and required the court to give their requested instruction to the jury, that the burden was on the government to prove they did not withdraw from the conspiracy.[3]

The law in this circuit is that the burden of proving withdrawal, an affirmative defense, is on the defendant. *See United States v. Killian*, 639 F.2d 206, 208-09 (5th Cir. Unit A), *cert. denied*, 451 U.S. 1021 (1981); *see also United States v. Finestone*, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948 (1987); *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986): *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). The defendants ask us to re-examine our decisions in light of a Seventh Circuit case, *United States v. Read*, 658 F.2d 1225 (7th Cir. 1981), in which the court overruled prior circuit precedent placing the burden on the defendant. The *Read* court concluded that earlier panel decisions were based on a misinterpretation of *Hyde v. United States*, 225 U.S. 347, 369 (1912). The court then examined the defense of withdrawal, concluding that because "withdrawal negates the essential element of membership [in the conspiracy], it must be disproved beyond

3 The district court instructed the jury on withdrawal, but put the burden on the defendants.

a reasonable doubt by the government." *Read*, 658 F.2d at 1236. The court, however, emphasized that the burden of going forward with the evidence is on the defendant. *Id.* at 1233; *see also United States v. Buckley*, 586 F.2d 498, 501 (5th Cir. 1978) (stating that the defendant must provide "some evidence, but more than a scintilla" to be entitled to an instruction on an affirmative defense), *cert. denied*, 440 U.S. 982 (1979).

This is all interesting but the defendants were not entitled to any withdrawal instruction because the issue was not sufficiently raised. To prove withdrawal the defendant must show "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978). MMR's decision to not submit a bid was hardly inconsistent with the object of the conspiracy for the reasons we have earlier given in our reading of the indictment.

VIII.

In his opening statement, counsel for Rutland told the jury to "please focus on the fact that Mr. Rutland is charged with what somebody else did. . . . The evidence is going to show that the only company charged in the Big Cajun job is MMR who did not bid. The evidence is going to show that the companies that did bid and did allegedly rig this were not charged." To rebut this statement the district court permitted the government to introduce evidence that unindicted co-conspirators Fischbach, Lord, and Foley had been charged with bid-rigging 19 times since 1983. The court did not permit the government to show the disposition of the charges.

The district court was persuaded that the evidence was relevant because it avoided "any inference that Fischbach . . . had become a preferred client of the government." Defendants argue that the court should have only admitted the co-conspirators' plea agreements relating to the Big Cajun job, agreements stipulated to be admissible. Although the court

offered defendants a limiting instruction at the time of its ruling, it ultimately gave none. Defendants requested no limiting instruction and made no objection, apparently choosing to leave the subject alone.

"This court has a 'long-established rule that a defendant's guilt may not be proven by showing that he associates with unsavory characters.' " *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982) (citation omitted). We have emphasized that evidence that one associates with a criminal is not probative of a defendant's guilt and have condemned attempts by prosecutors to taint the defendant's character by such evidence. *Id.* We have applied this rule where the government has introduced or attempted to introduce evidence of the arrests, convictions, or other bad acts of the defendant's friends, relatives, or associates. *See United States v. Escamilla*, 666 F.2d 126 (5th Cir. 1982); *United States v. Ochoa*, 609 F.2d 198 (5th Cir. 1980); *United States v. Labareda*, 581 F.2d 107 (5th Cir. 1978); *United States v. Vigo*, 435 F.2d 1347 (5th Cir.), *cert. denied*, 403 U.S. 908 (1971). *United States v. Westmoreland*, 841 F.2d 572, 579-80 (5th Cir.), *cert. denied*, 109 S.Ct. 62 (1988).

We are persuaded that the district court should have limited the evidence. We cannot agree, however, that the admission of this "guilt by association" evidence was reversible error. This case stands in stark contrast to our cases holding that the admission of guilt by association evidence is reversible error in the absence of a curative instruction. First, there was no request for a limiting instruction. Second, in those cases the guilt by association evidence stood alone as an indictment of the associate. Here, the evidence of the nineteen charges of Fischbach, Lord, and Foley was only in addition to the properly admitted evidence that Fischbach, Lord, and Foley had rigged bids on Big Cajun and were part of a larger conspiracy to rig bids nationwide on similar projects. Thus, the evidence was largely cumulative. Finally, the district court carefully prohibited any evidence of the disposition of the charges in an effort to tailor the evidence to the object of its offer—that Fischbach and Moore had become "preferred clients" of the government. We are not convinced that

the admission of the evidence objected to was reversible error.

IX.

Finally, the defendants argue that the cumulative effect of prosecutorial misconduct prevented Rutland and MMR from receiving a fair trial. They point to misconduct in four areas: (1) a reference to the availability to the defense of certain witnesses the government had under subpoena, (2) comments on the defendants' failure to call certain witnesses, (3) comments on the defendants' failure to introduce certain documents, and (4) misstatements of the record.

In reviewing defendants' prosecutorial misconduct claim, we first determine whether the prosecutor's remarks were improper. If they were we determine "whether the prosecutor's remarks cast serious doubt upon the correctness of the jury's verdict." *United States v. Goff*, 847 F.2d 149, 165 (5th Cir.), *cert. denied*, 109 S.Ct. 324 (1988).

Defendants first complain about the prosecutor's remark, as the government rested its case, that the government "had some witnesses under subpoena that we intended to call which we won't be calling. We will tender these to the defendants if they would like to call them, any of those that remain under subpoena." This remark seems to suggest that if defendants did not call these witnesses, it was because their testimony was unfavorable to them and, similarly, that the government had more evidence of guilt it chose not to present at trial. The government argues that the comment was in response to an earlier request by defendants that witnesses under government subpoenas be made available to them. We find no reversible error.

Defendants also object to the prosecutor's reference in rebuttal to the failure of the government to call certain MMR employees as witnesses. The government replies that the comments responded to defense arguments. Defendants argued that the change order executed by Fischbach in favor of MMR was legitimate. They argued to the jury that if the

change order was not legitimate Rutland would not have sent it to the Big Cajun jobsite to Doug Frederic, an MMR employee "five levels" below Rutland. The prosecutor replied:

> If as defendants want you to believe, that this was a wholly legitimate change order, where was Mr. Frederic in this case? Where was Mr. DeLatte? Mr. Polito told you Mr. Frederic was the project engineer on this job. Mr. Polito told you Mr. LeLatte was the job superintendent. You didn't hear from those people, even though they are employees of MMR, even though they were five levels down, so-called, from Pepper Rutland and could have come in and told you exactly how these various items of work were performed and how Fischbach got value for that.

Also, after defendants argued that the $250,000 MMR paid to Fischbach in connection with the SPR bid-rigging agreement might have been a loan, the prosecutor asked the jury why MMR had not called Mr. Weems, the MMR employee in charge of financial records, to testify.

The prosecutor's comments on the failure of the defendants to call certain of its employees were not improper. Although a party's failure to call a witness *equally* available to both sides may not be properly commented on, if a party fails to call a witness peculiarly within his control that may shed light on a fact issue, the prosecutor may properly comment on that failure. *United States v. Chapman*, 435 F.2d 1245, 1247 (5th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971). That the potential witness is physically present at trial or accessible to service of subpoena by the court does not make the witness equally available to both parties. *Id.* The relationship of the witness to a party may make him or her more available to that party. *Id.* That is the case here. Although the particular witnesses referred to by the government were under subpoena, they were MMR employees who could have shed light on a fact in issue. Moreover, they could have shed light on the validity of the arguments made by defendants.

The defendants argue that certain rhetorical questions asked by the prosecutor were improper. In response to an argument by defendants that the agreements referred to in Rutland's notes from the December 19 meeting were for legitimate work, the prosecutor pointed out that no witness said and no evidence showed that the agreement was for legitimate work. The prosecutor emphasized the lack of evidence supporting the defendants' argument with questions like "where is the document?" and "where is the witness?" The defendants contend that these questions were improper as an attempt to shift the burden of proof to the defendants. We disagree. Read in context these questions were a proper way of arguing that the defendants' argument was mere speculation unsupported by the evidence.

The defendants argue that the prosecutor improperly referred to defendants' failure to introduce certain documents even though he "knew" the documents were not available to defendants because an earlier order of the court established that they were destroyed in the regular course of business. In rebuttal the prosecutor noted the lack of documentary support for the defendants' argument that the Borden, Freeport, and SPR jobs were not bid-rigging agreements but legitimate business deals, as well as the lack of support for the defendants' contention that the change order was legitimate. The prosecutor stated that if documents supporting defendants' arguments existed they would have been introduced.

Despite defendants' suggestion to the contrary, the government did not violate the court's pretrial ruling. That ruling merely prohibited the government from introducing evidence on the manner in which the defendants had responded to the grand jury subpoena. In its ruling, however, the court stated that most of the documents relating to the Big Cajun job were destroyed in the regular course of business and that the defendants' failure to produce more documentary material was not due to any wrongdoing by MMR. Thus, say defendants, the prosecutor knew that they did not possess these documents, knew that the documents had not been concealed or destroyed by defendants, yet still commented on defendants' failure to introduce them into evidence.

Defendants, however, misread the court's ruling. The court's ruling did not establish that the documents referred to by the prosecutor existed and were destroyed in the regular course of business. The court found only that MMR did not wrongfully destroy any documents relating to Big Cajun. But if the facts were as defendants argued to the jury—the change order and the Borden, Freeport, and SPR agreements were legitimate—it is fair argument that documents supporting their legitimacy should have existed.

Finally, defendants argue that the government misstated the record in several respects in his closing argument. After carefully reviewing the record, we are persuaded that the alleged misstatements were either not beyond the evidence or were harmless error.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3526

Filed October 9, 1990

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MMR CORPORATION (LA) and JAMES B. RUTLAND,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING

Before

THORNBERRY, GEE and HIGGINBOTHAM,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ PATRICK E. HIGGINBOTHAM
PATRICK E. HIGGINBOTHAM
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3526

Filed November 1, 1990

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MMR CORPORATION (LA) and JAMES B. RUTLAND,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ORDER:

☑ The motion of appellant, James B. Rutland for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of appellant, James B. Rutland for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate

shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance or the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ PATRICK E. HIGGINBOTHAM
United States Circuit Judge

XII. CERTIFICATE OF SERVICE

I, Donald L. Beckner, a member of the Bar of this Court, hereby certify that on the 31st day of December, 1990, three copies of the Petition for Certiorari in the above entitled case were mailed, First Class, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C., 20530, and to Andrea Limmer, Antitrust Division, Department of Justice, Main Building, 10th & Pennsylvania Avenue, N.W., Room 3224, Washington, D.C. 20530.

/s/ DONALD L. BECKNER
Donald L. Beckner

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

(2)

No. 90-1064

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES B. RUTLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury on the defense of withdrawal from a conspiracy.

2. Whether petitioner was properly convicted of violating the Sherman Act because of his involvement in a bid-rigging scheme.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1064

JAMES B. RUTLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-37a) is reported at 907 F.2d 489.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A petition for rehearing was denied on October 9, 1990. Pet. App. 38a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 3, 1988, a grand jury in the Eastern District of Louisiana indicted MMR Corporation, its Chairman, Robert P. McCracken, and its President, petitioner. The

defendants were each charged with one count of violating the Sherman Act, 15 U.S.C. 1, and three counts of mail fraud, 18 U.S.C. 1341, for agreeing to rig the bids on the electrical construction portion of a power station known as "Big Cajun" Unit 3 near New Roads, Louisiana. The jury convicted petitioner and MMR on all counts and acquitted McCracken. Petitioner was sentenced to six months' imprisonment and fined a total of $103,000. The court of appeals affirmed. Pet. App. 1a-12a, 16a-37a.

1. In March 1980, representatives of several large electrical contractors, including Fischbach and Moore, Inc., had a meeting at which they discussed allocating future electrical projects. Fischbach expressed interest in the Big Cajun Unit 3 project and, over the next several months, was successful in persuading the other large contractors to agree to rig the bids on that project in its favor. Fischbach, however, could not proceed with its plan to rig the bids without the cooperation of petitioner's company, MMR. MMR previously had performed work for Cajun Electric and had persuaded Cajun engineers to put MMR on the bid list along with other companies that had demonstrated the financial and technical capability to perform the electrical portion of the Unit 3 contract. MMR had taken out plans for the project and had sent representatives to a meeting with Big Cajun engineers on December 16, 1980. Pet. App. 17a-18a.

On December 19, 1980, Paul Murphy, a regional vice-president of Fischbach, and J.R. Sturgill, another Fischbach official, met with petitioner and MMR's chairman Robert McCracken. Murphy told petitioner and McCracken that the other bidders on the Big Cajun project had agreed to rig the job in favor of Fischbach if MMR would also agree. Petitioner expressed his strong belief that MMR could do the work. He suggested that MMR and Fischbach perform the job as a joint venture, but Murphy would not agree to that proposal. After petitioner and Murphy went to the

men's room, however, they reported that they had struck a deal. MMR agreed to help Fischbach win the contract; in exchange, MMR would receive a subcontract for a portion of the work at a substantial markup. Pet. App. 18a-19a.

On January 14, 1981, two days before the bids were due, petitioner and his chief estimator came to Fischbach's offices to give Fischbach their cost estimates.[1] After discussing their cost estimates, they agreed that the actual cost of the job would be approximately $17 million. Fischbach decided to put in a bid of over $21 million and directed MMR to make an even higher bid. Because Fischbach was aware of MMR's good relationship with Cajun Electric and was afraid that Cajun Electric might select MMR if MMR's bid was too close to Fischbach's, Murphy decided that MMR should be the highest bidder. Petitioner, however, said that he would be embarrassed to submit a price that was so much higher than his estimate. To avoid that embarrassment, MMR did not submit any bid. On January 15, the day before the bids were due, petitioner wrote a letter to Cajun Electric telling it that MMR would not submit a bid, but instead would seek work as a subcontractor. Pet. App. 18a-20a, 22a n.2.[2]

Fischbach won the contract and, pursuant to its agreement, awarded MMR a subcontract for $4.3 million, which included a $1.5 million "fee" on top of MMR's cost of $2.8 million. The subcontract price that was submitted to Cajun

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[1] Murphy had asked MMR to prepare a legitimate cost estimate so that he could be sure that Fischbach had not made any mistakes in its estimates. Pet. App. 19a.

[2] Petitioner's letter stated that it would "quote certain areas of the project as a subcontractor * * * to all prospective bidders." GX 10. In fact, there was no evidence that MMR submitted subcontractor quotes to any bidder other than Fischbach. 27 Tr. 91-92, 103-106, 133-135.

Electric, however, was only $3.3 million. The remaining $1 million was paid to MMR in the form of a fictitious change order purporting to reflect additional work on the project after it was under way. Pet. App. 20a.

2. The court of appeals affirmed. It declined to consider petitioner's claim that the trial court's instructions on withdrawal were deficient for failing explicitly to state that, once evidence of withdrawal was established, the burden was on the government to disprove withdrawal beyond a reasonable doubt. Pet. App. 31a-32a. Rather, the court held that the defendants were not entitled to a withdrawal instruction because there was no evidence to support it. *Id.* at 32a. The evidence on which the defendants had relied to show withdrawal – the letter to Cajun Electric notifying it of MMR's decision not to bid – was "hardly inconsistent with the object of the conspiracy." *Ibid.*, citing *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).

The court also held that MMR's alleged inability to obtain the bonding necessary to submit a bid was not a defense to the Sherman Act violation charged in the indictment. Pet. App. 25a-29a. Petitioner and MMR claimed that, because MMR could not obtain bonding, it was not a competitor of Fischbach and, therefore, a per se violation of the Sherman Act could not be found. The court of appeals rejected that argument. It pointed out that, even if MMR was not a competitor, Fischbach and two other companies in the bid-rigging scheme were competitors. MMR's alleged status as a noncompetitor is irrelevant because "a noncompetitor can join a Sherman Act bidrigging conspiracy among competitors." *Id.* at 28a. Moreover, even if MMR was "arguably unable in fact to carry out its competitive threat," it nevertheless furthered the conspiracy among competitors. Fischbach could not have proceeded with its plan to submit rigged bids unless it was confident that MMR

would not submit a competitive bid. By agreeing to participate in the conspiracy and later assisting Fischbach in the preparation of its rigged bid, MMR acted in furtherance of the conspiracy. *Id.* at 28a-29a.[3]

ARGUMENT

1. Petitioner claims that there is a conflict among the circuits on the question whether a defendant bears the burden of proving that he has withdrawn from a conspiracy, and that the conflict warrants review. Pet. 8-13. The court of appeals, however, found that this case did not require resolution of that issue because the evidence did not support giving a withdrawal instruction at all. Accordingly, the issue raised by petitioner is not presented by this case.[4]

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[3] The court of appeals also rejected numerous other arguments made by petitioner and MMR, including challenges to the sufficiency of the evidence (Pet. App. 21a-23a), the trial court's unanimity instruction (*id.* at 25a), various evidentiary rulings (*id.* at 23a-25a, 29a-31a, 32a-34a), and alleged prosecutorial misconduct (*id.* at 34a-37a). Petitioner does not renew any of those arguments in this Court. He filed, however, a motion for a new trial alleging prosecutorial misconduct; the district court denied the motion, and petitioner's appeal from that ruling is pending in the court of appeals.

[4] In claiming a conflict on the issue that the court did not reach, petitioner relies primarily on the Seventh Circuit's decision in *United States* v. *Read*, 658 F.2d 1225 (1981), and maintains that that decision is in conflict with decisions from almost all the other courts of appeals. Pet. 8-9. We note that *Read* was not mentioned in a recent Seventh Circuit decision, which observed that "the burden of withdrawal lies on the defendant." *United States* v. *Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (quoting *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.)), cert. denied, 110 S. Ct. 1318 (1990). Petitioner also relies on *Patterson* v. *New York*, 432 U.S. 197 (1977); in *Patterson*, however, this Court expressly "decline[d] to adopt as a constitutional imperative * * * that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability

Withdrawal from a conspiracy requires " '[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators.'" Pet. App. 32a, quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). The courts of appeals are in agreement that the burden of going forward with the evidence of withdrawal is on the defendant. See Pet. App. 32a; *United States* v. *Read*, 658 F.2d 1225, 1236 (7th Cir. 1981). Petitioner's withdrawal argument is based on the letter that MMR sent to Cajun Electric shortly before the bid letting in which MMR stated that it was not going to submit a bid. Pet. 7. As the court of appeals observed, however, that letter was entirely consistent with the ultimate objective of the conspiracy. Pet. App. 32a. Fischbach organized the conspiracy and then recruited MMR to join it because Fischbach wanted to be the winning bidder for the Unit 3 project. Pet. App. 18a. MMR's ultimate agreement not to submit a bid eliminated it as a potential successful bidder and guaranteed the success of the conspiracy. Indeed, by falsely suggesting in the letter to Cajun that MMR was submitting "competitive" subcontract quotes to all the other bidders (GX 10), when in fact MMR had agreed to an exclusive arrangement with Fischbach, the letter affirmatively furthered the conspiracy by deceiving the bidding authorities.[5] Moreover, petitioner continued to participate in the conspiracy after the bid

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of an accused," *id.* at 210, and upheld a conviction where the jury had been instructed that the burden of proving the defense of extreme emotional disturbance was on the defendant. See also *Martin* v. *Ohio*, 480 U.S. 228 (1987).

[5] The letter was not inconsistent with the agreement to help Fischbach win the contract; it did not defeat the purpose of the conspiracy to enable Fischbach to be the low bidder; it was not calculated to disclose the bid-rigging scheme to the authorities; and it was not even calculated to "reach co-conspirators" to advise them of MMR's withdrawal. See *United States Gypsum Co.*, 438 U.S. at 464-465.

date by negotiating with Fischbach for MMR's payoff on the lucrative subcontract and by receiving that payoff. See Pet. App. 20a, 23a.

Under these circumstances, the court of appeals correctly concluded that petitioner was not entitled to an instruction on the affirmative defense of withdrawal. Pet. App. 32a. Because petitioner was not entitled to an instruction on that issue, the court of appeals did not have to consider the question of who should bear the burden of proof on the issue of withdrawal. Accordingly, the result in this case would be the same even if petitioner were correct in asserting that the government must bear the burden of proof on the affirmative defense of withdrawal from a conspiracy.[6]

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[6] We disagree with the court of appeals' observation (Pet. App. 31a n.3) that the district court's jury instructions placed the burden of proof on the withdrawal issue on the defendants. The district court instructed that "[a] person can withdraw from a conspiracy by taking some affirmative steps to terminate or abandon his participation in, and efforts to promote, the conspiracy. In other words, the defendant must have demonstrated some type of positive action which disavowed or defeated the purpose of the conspiracy. Mere cessation of activity does not constitute withdrawal." 48 Tr. 74. The court also instructed the jury that "there is no requirement that a defendant try to convince the other co-conspirators to abandon their undertaking, or that he go to public authorities or others to expose the conspiracy or to prevent the carrying out of an act involved in the conspiracy." *Id.* at 75. The court then "reminded [the jury] that the burden remains on the government to prove, beyond a reasonable doubt, that the defendants were members of the conspiracy." *Ibid.* If "it affirmatively appears from the evidence that [a defendant] in good faith disavowed and completely withdrew from any participation in the conspiracy * * * * prior to November 3, 1983 [the period of the statute of limitations], you must find them not guilty." *Id.* at 76. Finally, the court stated that the jury could not "find any of the defendants guilty unless the government proves, beyond a reasonable doubt, that the defendants were members of the charged conspiracy sometime within the period beginning November 3, 1983, and ending November 3, 1988." *Id.* at 76-77. Thus, the court never

2. Petitioner claims that he was improperly convicted of illegal bid-rigging on a per se theory (Pet. 13-23), but that claim rests on erroneous assumptions of fact and law.

Petitioner first contends that "[u]nder the holding of this case, companies that cannot bid on the prime contract and elect to bid as subcontractors are subjected to *per se* scrutiny under the Sherman Act." Pet. 17. Petitioner's suggestion that his conduct was nothing more than the routine conduct of a subcontractor is belied by the evidence presented at trial and relied on by the court of appeals. By its verdict, the jury found that petitioner and MMR had agreed with Fischbach and others to rig the bids on the Unit 3 project. Pet. App. 23a.[7] As a payoff for its participation in the conspiracy, MMR received a "lucrative subcontract" from Fischbach. Pet. App. 23a. This case does not involve a legitimate subcontracting agreement but rather conduct in furtherance of a per se illegal bid-rigging agreement. Petitioner's observations on the virtues of legitimate subcontracting (Pet. 15-19) are therefore irrelevant.[8]

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charged that the defendants bore the burden of proving withdrawal. To the contrary, the court emphasized throughout the charge that "[t]he government has the burden of pro[v]ing every element of the charges beyond a reasonable doubt, and if it fails to do so, you must find the defendants not guilty." *Id.* at 36; see also *id.* at 64-65, 75-77, 84.

[7] The jury was instructed that petitioner could be found guilty only if the bid-rigging conspiracy charged in the indictment existed, and that petitioner knowingly joined that conspiracy. 48 Tr. 63-66, 70. The court instructed the jury (1) that it could not convict if the decision not to submit a bid was the result of an independent business decision (*id.* at 69); (2) that discussions and exchanges of information with Fischbach were not illegal in the absence of an agreement to rig a bid (*id.* at 70); and (3) that, in deciding whether the alleged bid-rigging conspiracy existed, the jury could consider whether MMR was capable of submitting a bid and whether it had actually submitted a bid. *Id.* at 68-69.

[8] Indeed, the conspiracy of which petitioner was convicted undermines the very process that petitioner extols. Not only did petitioner

In suggesting that his conduct "promoted competition" and efficiency (Pet. 14, 19, 20-21), petitioner fails to provide any pro-competition justification for the blatant bid-rigging in which he engaged. Price fixing is "the archetypal example" of conduct that is "illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 646-647 (1980) (per curiam). See also *FTC* v. *Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 780-781 (1990); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); accord *Palmer* v. *BRG of Georgia, Inc.*, 111 S. Ct. 401, 402 (1990) (per curiam). Petitioner's attempt to provide an efficiency rationale for his conduct fails to address this fundamental principle.

Petitioner also renews his claim that he cannot be liable for a per se violation because MMR purportedly lacked adequate bonding capacity for the bid and thus was not a viable competitor of Fischbach. Pet. 21-23. This contention is also unavailing. Even if petitioner's characterization of the record is accepted,[9] petitioner did not participate only in an agree-

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and Fischbach rig the prime contract, but they subverted competitive bidding on the subcontract as well. Compare Pet. 15-19. Fischbach did not award the electrical subcontract on the basis of competitive bids; it did not choose from among a host of prospective subcontractors in order to select a "subcontract bid that represents the most efficient combination of [various market factors]." Pet. 18. Fischbach agreed to award MMR the subcontract as a payoff for helping Fischbach rig a bid, even though MMR did not submit the lowest price of all the subcontractors (17 Tr. 73; 32 Tr. 52-53, 58; 33 Tr. 85-86), and even though it meant paying MMR a huge markup on the subcontract.

[9] The evidence does not support petitioner's premise that it could not have obtained adequate bonding for the Big Cajun project. While Aetna did deny MMR's request for a large bond, MMR did not try to secure bonding or credit from other sources that had expressed a willingness to help MMR (42 Tr. 192-193; 43 Tr. 22, 46), nor did it appeal to Aetna to reconsider its decision. Indeed, only a few months after the bid

ment between non-competitors. As the court of appeals explained, petitioner participated in and facilitated a conspiracy between competitors. See Pet. App. 28a-29a. MMR, moreover, clearly posed a "competitive threat," even if it was unable to carry out the threat, and its agreement to participate in the bid-rigging scheme was essential to ensuring the scheme's success. *Ibid.* Petitioner's assertion that his participation in the bid-rigging conspiracy was "meaningless" (Pet. 21) is thus plainly incorrect. Accordingly, the court of appeals correctly determined that petitioner was subject to per se liability for his role in the price-fixing scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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date, Aetna increased MMR's bond limit for another project (42 Tr. 117-120, 125-126), thus suggesting that MMR might have persuaded Aetna to raise its bonding limits on the Big Cajun project. MMR did not pursue any of those alternatives.

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